Supreme Court, U.S.
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No. 06-1503

In The
Supreme Court of the United States

IN RE: AMH, A MINOR, D/O/B 01/28/99
By Next Friends

JERRY L. BAKER AND WIFE,
LOUISE K. BAKER,
Petitioners/Appellees,

v.

SHAIO-QIANG HE AND
QIN LUO (HE),
Respondents/Appellants.

On Petition for Writ of Certiorari to
the Tennessee Supreme Court

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*Larry E. Parrish
LARRY E. PARRISH, P.C.
6075 Poplar Avenue
Suite 420
Memphis, TN 38119

901-767-8000

* *Counsel of Record for Petitioners*

May, 2007

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED

Does an 8 year old child (who has an 8 year familial bond with court-appointed guardians and who concededly will suffer substantial harm from the severance of the bond) have a Fourteenth Amendment and Fifth Amendment liberty interest (indicated by *obiter dictum* but never definitively decided by this court) in uninterrupted continuation of the familial bond that makes it impossible for the biological parents (with unterminated parental rights but who are strangers to the child) to have physical custody of the child, even though ***Stanley v. Illinois***, 405 U.S. 645 (1972) and its progeny ordinarily would entitle the biological parents to custody?

Did the Tennessee Supreme Court, by retrospectively applying materially new law, resulting from never-before-indicated explicit overruling of all (i.e., at least 18 consistent rulings spanning 70 years) of its prior law, to achieve a result that would have been an impossible absent the new law, violate Guardians' Fourteenth Amendment substantive due process rights articulated by this Court in ***Fleming v. Fleming***, 264 U.S. 29, 31 (1924); ***Tidal Oil Co. v. Flanagan***, 263 U.S. 444, 453 (1924); ***Montana National Bank of Billings v. Yellowstone County, Mont.***, 276 U.S. 499, 504-5 (1928); ***Bouie v. City Of Columbia***, 378 U.S. 347, 352-53 (1964); ***Rogers v. Tennessee***, 532 U.S. 451, 458, 460, 462 (2001).

PARTIES

Petitioner, AMH, is a minor child who, on January 28, 2007, became eight years old. On February, 27, 1999, when AMH was 27 days post-birth, AMH's biological progenitors, respondents, Shao-Qiang He and Qin Luo (hereinafter **"the Hes"**), through an adoption agency, delivered physical custody of AMH to AMH's next friends, Jerry L. Baker and Louise K. Baker (hereinafter **"Next Friends"**). Next Friends, since June 4, 1999, have been and continue to be the court-appointed guardians of AMH (hereinafter **"Guardians"**) with full guardianship rights and obligations in relation to AMH

AMH is a fully endowed American citizen born in the United States on January 28, 1999. AMH has resided in Shelby County, Tennessee for the entirety of her life.

The Hes are citizens of the Republic of China. Shao-Qiang He arrived in the United States by a visa entitling him entry, as the spouse of a Chinese citizen in the United States, on a student's visa. Later Shao-Qiang He obtained, while in the United States, a student visa of his own. In October 1998, Shao-Qiang He lost entitlement to his student visa because he was expelled from the University of Memphis.

Qin Luo entered the United States illegally, based on a fraudulently obtained visa claiming her to be the spouse of

Shao-Qiang He, at a time when Shao-Qiang He retained his student visa.

Neither Shao-Qiang He nor Qin Luo have permits to receive income while in the United States, and each is subject to deportation when legal proceedings in this case are concluded.

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CITATION OPINIONS/ORDERS

The opinion and judgment filed by the trial court on May 12, 2004 is unpublished (A.H1).

The opinion of the court of appeals is accessible online, ***In re: Adoption of AMH***, 2005 WL 313253 (Tenn.Ct.App. November 23, 2005) (A. F1).

The opinion of the Supreme Court, including the order on petition to rehear, is published as ***In re Adoption of AMH***, 215 S.W.3d 793 (Tenn. Jan. 23, 2007) (A. D1).

JURISDICTION

(i) The January 23, 2007 judgment and order on rehearing, is what this petition seeks to have reviewed.

(ii) The date of the order denying Next Friends' petition to rehear was February 9, 2007.

(iii) This is not a cross-petition for writ of certiorari.

(iv) The statutory basis for this Court's jurisdiction is Title 28, ***United States Code*** §1257(a).

(v) The Tennessee Attorney General made appearance at all levels. This petition is served on the Tennessee Attorney General.

CONSTITUTIONAL PROVISIONS/STATUTES

United States Constitution, Fourteenth Amendment, Section 1, Due Process Clause reading as follows:

> No state shall make or enforce any law which shall ... **deprive any person of** ..., **liberty ... without due process of law**; ... .

United States Constitution, Fifth Amendment, Due Process Clause reading as follows:

> No person shall ... be deprived of ..., liberty, ..., without due process of law; ... .

STATEMENT OF THE CASE/MATERIAL FACTS

From 27 days post-birth (A. H36 ¶92) up to the present (A. D40, J1-J3), AMH, by court order, has been in the physical custody of Next Friends and reared as if a daughter to Next Friends, sibling to Next Friends' other children, a granddaughter to Next Friends' parents, a niece to Next Friends' siblings, a cousin to nieces and nephews, in a loving and nurturing familial setting where all of AMH's needs have been met (A. H10, H12, H13).

On June 4, 1999, when AMH was 4 months post-birth, an order was entered by Juvenile Court whereby, on signified consent of the Hes, AMH was adjudicated to be in the sole custody of Next Friends who were declared to be her guardians (A. H262, H10, H87 H88, H90); the June 4, 1999 order reserved no visitation for the Hes (A. H66).

Being guardians, Next Friends assumed statutory rights and obligations codified in *TCA* §37-1-140 reading:

> A custodian to whom legal custody has been given by the court ... has the **right to** the physical custody ..., the **right** to determine the nature of the care and treatment ..., including ordinary medical care, the **right and duty** to provide for the care, protection,

training and education, and the physical, mental, and moral welfare of the child.

The Hes, thereafter, petitioned twice to remove AMH from the custody of Next Friends. The first, filed when AMH was 15 months old, was denied by order of court entered on June 28, 2000 (A. H54, 147, H61, H69). This denial was not appealed (A. H90). A second was filed on May 29, 2001 (when AMH was 2 years, 5 months), and was denied on May 12, 2004 (A. H2, H30, H60, H66, H67, H88, H99).

Other than for a encounter in September 2003 at the office of a psychologist and a confrontational happenstance at Wal-Mart, in early 2004, the Hes had no contact with AMH after January 28, 2001 (A. H22, H75, H81), until March 15, 2007 (when AMH was 8 years).

At trial and on appeal, through her court-appointed guardian ad litem and attorney ad litem, AMH has defended against the Hes having custody of her (A. I2-I10).

The trial court denied the petition of the Hes to regain custody. This was based on extensive findings (A. H-78, H-97) that AMH will be substantially harmed by detaching AMH from Next Friends.

What is required to terminate guardianship rights in Tennessee is codified in *TCA* §36-1-113, requires exactly the same standards as required to terminate parental rights.

The Hes initiated an appeal to the court of appeals. The court of appeals, in a 114-page ruling/19-page partial dissent (A. F1, G1), affirmed the judgment of the trial

court, explicitly concurring in the findings of the trial court concerning substantial harm AMH will suffer by reunification and the willfulness of the Hes' surrender of their custody rights. The Hes appealed.

On January 23, 2007, the Supreme Court rendered its opinion (A. D1, E1) reversing the court of appeals and ordering reunification.

The Supreme Court nullified (A. D35) the thrice-reaffirmed (by Juvenile Court, on June 28, 2000; trial court on May 12, 2004; court of appeals on November 23, 2005) June 4, 1999 consent order. In spite of the trial court's findings of fact, explicitly concurred in by the court of appeals (A. F1), that the Hes knowingly, willfully and understandingly consented to the guardianship of Next Friends (when AMH was 4 months and 6 days old), the Supreme Court found that the Hes consented without understanding the implications of the.

The Supreme Court took note of law in Tennessee stating as follows (A. D28):

> A **judgment** does **not** become **final until** 'all direct appeals have been **exhausted** including an application for appeal or for **certiorari to the ... United States supreme court**.' .

The judgment of the Supreme Court is not final. The judgment has not concluded the rights, entitlements and obligations of AMH, Next Friends or the Hes.

Next Friends' petition to rehear directed attention to the fact that the judgment rendered AMH lawyerless.

On February 9, 2007, the Supreme Court denied Next Friends' petition to rehear by an order, in part, reading as follows (A. A1-A4):

> The Bakers also assert that we have left A.M.H. "lawyerless" ... attorney ad litem ... . We have **not limited** the **juvenile court's authority to consider ... requests for ... an attorney ad litem** on behalf of A.M.H.

Commencing March 15, 2007 and continuing to the present, there have been supervised visits to establish contact between AMH and the Hes (A. J1-J3, K1-K5).

On March 13, 2007, in Juvenile Court, Next Friends[1] filed a motion requesting an attorney ad litem for AMH (A. K1-K5).

At the April 11, 2007 hearing, Juvenile Court announced that it would not appoint an attorney ad litem for AMH and not expand the duties of the guardian ad litem to provide legal representation (A. K1-K5).

The Supreme Court's judgment leaves nothing to speculation about whether breaking the familial bond between Next Friends and AMH will harm AMH; rather, the Supreme Court acknowledged (A. D-2) that AMH,

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[1] The authority of this Court, stated in ***Smith v. Organization of Foster Families***, 431 U.S. 816 (1977) at 840-41 n. 44, gives Next Friends standing to advocate for AMH.

thereby, will be substantially harmed, will be traumatized and added that it was unnecessary to reach the question of AMH's best interests.

In Juvenile Court on April 11, 2007, the court-appointed psychologist stated (A. J1-J3) that, if AMH were reunified with her biological progenitors, then, because of subsequent rulings, had to be dis-unified in order than to be reunified with Next Friends, this "would be extremely stressful." Dr. Collins explained as quoted in the appendix.

The guardian ad litem stated as follows (A. K1-K5):

> [Y]ou know, these visits have been proceeding fairly well. I mean, you know, no one thought that this would be easy.
>
> **Are we going to leave this with** absolutely **zero trauma** to this child? **No**, we are not. I think we all know that.
>
> ***
>
> Are these **visits difficult** for the child? **Yes**, they are.
>
> **Do** they **start out** at times **with her crying**, or **does she leave crying**, does she get **agitated**? **She does**. (emphasis added)

The Juvenile Court judge explained that he, the guardian ad litem and court-appointed psychologist are functioning for one purpose only, i.e., not to question reunification but to effectuate it.

From the words of the Juvenile Court judge, the only conclusion is that, if the least amount of trauma to reunite

leaves AMH in a lifelong catatonic state, Juvenile Court will consider it to have done all it is commissioned to do.

On April 18, 2007, Juvenile Court entered an order denying AMH a lawyer.

Federal Questions Raised Below

The question presented by AMH's petition boils down to whether the fundamental constitutional right of the Hes, as the biological progenitors with an unterminated parental right to custody, so conflicts with AMH's fundamental constitutional liberty right not to be forced by a court to suffer substantial harm and trauma from severing her perfectly healthy familial bond that the former right must yield to the latter.

An ultimate question arises. Must the Hes' fundamental constitutional right give way, totally or partially, to AMH's fundamental constitutional right where the only reason for forcing AMH to suffer is to enable the Hes to exercise their as yet unexercised right to custody?

Guardians' question involves the Fourteenth Amendment's prohibition making it impossible for courts, by retrospective application of a law-changing judicial construction of a statute, to deny a litigant the benefit of the pre-changed statute.

The federal questions concerning the Fourteenth Amendment and Fifth Amendment due process rights that protect AMH from being forced by court order to suffer substantial harm and be traumatized, in opposition to her interests, to make way for the Hes to have custody was first

raised in the record on April 12, 2004 as part of the final argument of counsel for Next Friends as follows:

> [I] ... refer ... to ... United States Supreme court, Smith Versus Organization of Foster Families, ... Supreme Court ... scope of ... parental rights, extends beyond natural parents. The ... parent in Prince, ... was ... aunt and legal custodian ... then ... Moore case. ... legal custodian ... has constitutional rights, ... equal to ... parents, ...
>
> ***
>
> [S]mith ... says foster care ... intended ... only temporary.
>
> ***
>
> [b]ack to Smith ... Supreme Court said ... definition of family ... Justice Brennan, ... writing ... reading ... page 843 ... .
> "First, ... biological relationships, ...
>
> ***
>
> [q]uote from Prince virsus Massachusetts, ... "It is cardinal ... custody, care and nurture of the child reside first in ... parents, ... primary function ... obligations ... State can neither supply nor should ... .
> [c]ontinuing ... page 843-844. 'But biological relationships are not exclusive determinations of the existence of a family."

> ... . 'Some justices ... have suggested ,,, where ,,, substantive protection ... Due Process ... involved, biological relationship alone ... not sufficient ... create a constitutionally protected family, ...'
>
> ***
>
> [t]hen ... [U.S. Supreme Court] go on to say, 'Thus, ... importance ... familial relationship, ... stems from ... emotional attachments ... intimacy ... daily association ... instruction of ... children as well ... . [t]hen ... [U.S. Supreme Court] talk about ... psychological parent and how important ... psychological parent.

The same issue first raised in Next Friends' final argument was briefed in Next Friends' appellees' brief in the Supreme Court on pages 136-142 with a more thorough explanation of the authorities, quoting from pertinent cases from this Court.

The trial court terminated all of the parental rights of the Hes and denied the Hes custody. The trial court ruled (A. H-83-H86), by written conclusions of law, opining, by multiple citations to this Court's cases that AMH has a liberty interest protected by the Fourteenth Amendment that the trial court had to balance against the Fourteenth Amendment liberty interest of the Hes.

On pages 18-20 of Next Friends appellees' brief in the Supreme Court, these conclusions of the trial court were quoted and relied on by Next Friends.

The opinion below shows no recognition of any thought concerning these constitutional issues.

After, but not until, the court of appeals concurred in (A. Q1-Q21) findings by the trial court establishing that the Hes, understandingly consented to Guardians uninterrupted custody of AMH, Guardians were forever thereafter secured by law in Guardians' custody of AMH. But, the Supreme Court overruled, by a one sentence edict, 75 years of consistent Supreme Court precedent construing *TCA* §27-1-113 as a statutory mandate that prohibited the Supreme Court disturbing stated concurred-in facts. But, even this surprise could not have shaken Guardians' custody because this new construction of §27-1-113, constitutionally, is prospective only. But, in violation of this Court's precedent, establishing that new law created by a state court abandoning a clearly fixed construction of a statute in favor of an unforeseeable new construction, is required by the due process clause to be applied prospectively only, the new law was applied retrospectively to Guardians.

ARGUMENT

The Baby Jessica Case involved an 8 month old infant. The sole issue was whether the Michigan Supreme Court ordered the baby returned without considering the baby's best interest. There was no petition to this Court, but there

was a denial application for stay. Justices Blackmon and O'Conner dissented stated in ***DeBoer v. Schmidt***, 509 U.S. 938 (1993):

> This is a case that touches the raw nerves of life's relationships.
>
> ***
>
> Jessica,... asks that we stay the decision of the Supreme Court of Michigan until we have had an opportunity to review the issues presented. While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with **the personal vulnerability of the child so much at risk.** And with the Supreme Court of **New Jersey and** the Supreme Court of **Michigan** in **fundamental disagreement** over the **duty** and authority of **state courts to consider** the **best interests** of a child [in] rendering a custody decree. (emphasis added)

AMH

The New Jersey Supreme Court ruled as follows in ***Sorentino v. Family & Children's Society of Elizabeth***, 378 A.2d 1168 (N.J. 1977) at 1171:

> The **possibility** of serious psychological harm to the child in this case transcends all other considerations. (emphasis added)

Because AMH is just a child who knows nothing about the law, is innocent in every sense of the word and has not a clue what has gone on in litigation for most of her life, it is impossible to represent her without presenting the case as she sees it. To do this, a hypothetical dialogue between AMH and a person explaining to her what has happened gives adults a picture from AMH's eye level (A. R1-R8).

What sets this case apart from all cases is that the opinion acknowledges that the effect of the judgment will traumatize AMH, cause her substantial harm and states that what is in AMH's best interest is unnecessary for the Supreme Court to know, i.e., is unimportant to the law.

Is it within the realm of civilized jurisprudence that any court ever could enter an order intending its effect to be that a child suffer substantial harm accompanied by trauma?

Such a thought is all the more unfathomable to civilized jurisprudence in view of the fact that the substantial harm and trauma was not merely acknowledged by judicial notice as a potentiality; this was acknowledged, without doubting, the findings (A. H72, H74, H78, H97) by the trial court (after 91 hours of in-court testimony), concurred in by the court of appeals (A. H-12).

The court reported an all-states survey of the law in ***Watkins v. Nelson***, 748 A.2d 558, 565-67, 587-89 (N.J. 2000). The majority opinion's survey categorizes the law in 33 states. A dissenting opinion comments with a different

perspective on the law in 9 states and adds to the states surveyed by the majority, Colorado and Delaware.

Interesting to the present petition is what ***Watkins*** says about Tennessee law (748 A.2d at 566-67):

> *In re Adoption of Female Child*, 896 S.W.2d 546, 548 (Tenn. 1995) (stating parent cannot be deprived of custody unless there has been a finding of substantial harm to the child)....

It is necessary to consider a sentence that could be read out of context to give a false impression that Tennessee law would not be changed by the opinion below. The sentence reads (A. D39):

> Given the **lack of evidence** of a threat of substantial harm to A.M.H. if she is returned to her parents, we conclude that physical custody of A.M.H. must be returned ... .

The **"lack of evidence"** to which the quoted sentence alludes is in the face of lengthy findings by the trial court, finding that AMH would suffer substantial harm if she is returned to the Hes; this evidence was reviewed after which the court of appeals affirmed the substantial harm findings by the trial court.

The Supreme Court did not overturn any of the findings of the trial court concerning substantial harm.

Read out of context, the quoted sentence would seem to indicate that Tennessee law remains as it was. In context, it can be seen that the law of Tennessee, by the decision below, would become significantly different and

Tennessee's law would become unique and isolated from the remaining 49 states. No other state has so radically defined what is not "harm."

This is evident when reading the operative sentence in the opinion. Prior to the above-quoted sentence, the Supreme Court wrote (A. D2, D17, D38):

> Evidence that **A.M.H. will be harmed** from the change in custody **because she** has lived and **bonded with the Bakers** cannot constitute the substantial harm required to prevent the parents from regaining custody. (footnote omitted) (emphasis added)

What the Supreme Court has done is restrict "substantial harm" so that, if substantial harm emanates from breaking the 8-year life-long bond between the child and the child's court-appointed guardians, this, while substantial harm, will not be counted as "substantial harm" when deciding whether there is "substantial harm" that would prohibit the reunification.

From AMH's perspective, what the cause of the harm is could not be of less concern to the real life harm she is suffering. AMH is being harmed in the head; to talk to her about why the hammer must hit her head is nothing but gobbledygook to AMH. The Supreme Court has no limits on the quantity or quality of substantial harm AMH will be forced to endure. If breaking the familial bond to effectuate the reunification means that AMH, within a year, will be dead, the death is immaterial, i.e., just a price AMH has to

pay in order for the biological progenitors to exercise their constitutional right to custody. The Supreme Court shows no concern for the fact that the Hes have zero relationship with AMH other than an 8 year removed biological link.

The Supreme Court explicitly wrote that it expected AMH to be traumatized (A. D40).

In addition, the Supreme Court's "lack of evidence" finding is based on a record that has no information in it that is less than three years dated.

What has transpired in the intervening years, if investigated, might provide evidence of substantial harm from any number of sources. The Supreme Court expressed no need to gather current information.

What substantial harm and trauma looks like under very similar circumstances as presented by the instant case cannot be more definitely explained than through ***In re Jasmon O. v. Gavin O.***, 878 P.2d 1297 (Cal. 1994) reh. den. October 27, 1994.

In that case, a female child who, on the date of the decision by the California Supreme Court, was 6 years and 10 months, had been ordered reunited with her natural father who had an **unterminated** parental **right** to **custody**. Since almost 8 months old, the child had resided with the same foster parents. The plan of reunification continued, gradually, before the supervising psychologist halted the transition. Why halting the transition was required is seen by reading ***Jasmon O.***, *supra* 878 P.2d, at

1305-1309 (A. M1-M7).Juvenile Court records evidence symptomlogy like the child in ***Jasmon O.***

A news story published on ABC News Law and Justice website, on May 4, 2007, states as follows commenting on evidence (*infra* at 21) ("journal") of record in Juvenile Court:

> 'Anna clearly has strong attachments to her foster parents and appears to have none to her biological parents,' said Dr. Donald Saposnek, a clinical child psychologist who has handled over 4,000 custody mediations and reviewed the journal at ABC's request.
>
> 'So she's being threatened with being pulled away from her basic stability in life and being cast off to strangers. And she's reacting like a wild animal, because her emotional survival is at stake.'
>
> ***
>
> But Saposnek said the Bakers are right to be worried. 'It's a myth that all children are resilient and can bounce back from emotional trauma,' said Saposnek. 'So many negative responses over such an extended period of time suggest that she isn't that resilient and that she will retain this whole thing as a major conflict for many, many years – maybe her whole life. She may feel abandoned and betrayed by the Bakers and

feel a profound sense of powerlessness and anger that has potential lifelong consequences.'

There is no better way to draw attention to the constitutional issues than by quoting from ***Sorentino*** *v.* ***Family & Children's Society of Elizabeth***, 367 A.2d 1168, 1170 (N.J. 1976) (A. O1-O3).

A child who, at the time of the decision in ***Sorentino***, was 31 months, 12 days post-birth,[2] had been surrendered by the child's mother during the first month of the child's life. The biological father had not received any notice that his rights to custody had been interrupted. The trial court's determination that the surrender by the mother had been coerced and, therefore, was not effective and that the biological father's right to custody had been unconstitutionally interrupted was affirmed.

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[2] By comparison, AMH was 7 years, 11 months, 25 days when the Supreme Court rendered its judgment below. Also, it should be noted that, when the **Hes first made it known that they wanted custody** of AMH returned to them was by filing a petition in May 2000, **when AMH was 15 months**. This petition was denied in June 2000 (AMH was 6 months), after which, the **Hes** made **no further request** for custody **until** 11 additional months expired, **when AMH was 2 years, 4 months** post-birth; in comparison, the biological parents in ***Sorentino*** filed their petition when their child was 14 months post-birth and continued without a break; the ***Sorentino*** court commented that the 14 month delay by the biological parents was unfortunate but inexcusable and contributed to the bonding that made reunification impossible.

From the time the child was one month post-birth through the decision of the New Jersey Supreme Court, the child had resided with prospective adoptive parents.

The question in ***Sorentino*** was whether the child, in the custody of prospective adoptive parents for 30 months (in comparison AMH's 8 years, 2 months), could be reunified in light of the fact that this would require dislodging this 2 year old child from the prospective adoptive parents.

In ***Sorentino***, the New Jersey Supreme Court ruled that the **"potential"** for psychological harm to the child required an evidentiary hearing to determine whether, if the child were reunited, the child could be expected to experience psychological harm. The New Jersey Supreme Court's words speak for themselves in ***Sorentino***, *supra* 367 A.2d at 1170 et seq. (A. O1-O3), citing texts and cases to support why the **law**, in assessing the potentiality for psychological injury, **must attach "substantial significance to the length of time the child has been with the prospective adopting parents and to the quality of the developing relationship."**

The New Jersey Supreme Court heard an appeal by the birth parents in ***Sorentino*** challenging the results of the evidentiary hearing that, in spite of the fact that the biological parents had an unterminated right to custody, the child could not be placed in the custody of the birth parents.

The New Jersey Supreme Court opined at length concerning the interests at stake under the United States Constitution and giving life to the proposition that the

likelihood of harm to the child transcends all other concerns. The analysis is in ***Sorentino v. Family & Children's Society of Elizabeth***, 378 A.2d 18 (N.J. 1977) at 20 (A. P1-P3), focusing on the significance of "serious psychological harm" in view of the fact that the 31 month old child had spent a **"substantial period" in the "only real home she had known."**

Numerous cases follow the ***Jasmon O.*** and the ***Sorentino*** approach to constitutional law.[3] The literature endorses the ***Jasmon O./Sorentino*** approach to constitutional law.[4] This Court has often opined that, while the parental rights of birth parents rank high in the hierarchy of fundamental constitutional rights, those rights can only be effectuated where exercising them will not impinge on fundamental constitutional rights of children that hem in the parents' rights.

This Court has had much to say in its decisions venerating the constitutional importance of the familial bond and of preserving the familial bond in order for society to thrive. This Court has noted that the familial bond is not merely a product of biology (A. H83-H86; S1).

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[3] A Shepard's search of Jasmon O. reveals in excess of 350 cases discussing or citing the case, and no cases refuting the principles stated. The Sorentino cases, by a Shepard's search reveals the same in well over 100 citations. There is no evidence that either California or New Jersey is infected by a rash of suits by children attempting to "divorce" their parents.

[4] See Appendix p. S1.

The ruling below is as far removed from the doctrine stated in the ***Jasmon O.*** and the ***Sorentino*** rulings as possibly could be conceived.

If the opinion below becomes the law in Tennessee, the law will become that unterminated biological links entitle the biological progenitors to custody of the child, even if the child is 8 years old, the child is totally bonded to the only persons the child has ever known as parents, siblings, grandparents, cousins, aunts and uncles and even if a court determines that dislodging the child from the bonded family will traumatize the child and cause the child substantial harm.

If 8, why not 10 and, if 10, why not 15? If a guardianship, why could the same court not just as likely set aside the surrender that preceded an adoption?

In Tennessee the difference in adoption and guardianship is ephemeral ***TCA*** §36-1-113.

To appreciate the poignancy of ***Jasmon O.*** and ***Sorentino*** to the current realities, the efforts to date to reunify AMH with the Hes should be considered.

The Juvenile Court record includes an affidavit filed by Next Friends detailing what has occurred, since January 23, 2007, in the life of AMH, as a result of the judgment below.

Comparing the symptoms spelled out in the ***Jasmon O.*** quote (A. M1-M7) with the symptoms evidenced by AMH, while the transition process in the instant case continues, finds almost a perfect parallel.

While the Supreme Court refers to the Hes as AMH's "parents," from everything AMH knows, the Hes are hardly more than strangers. This difference in perspective has been referred to as the difference in a **child-parent** relationship and **a parent-child** relationship.

The case that uses this distinction is ***Smith v. City of Fontana***, 818 F.2d 1411 (9th Cir. 1987). The issue there had to do with claims under Title 18, ***United States Code*** §1983. There, a parent of children had been killed by "egregious government conduct in the form of excessive and brutal use of physical force." *Id* at 1417.

It was determined that the estate of the killed parent could recover for violation of the parent's liberty interest in a continued relationship with the parent's child; then, the Ninth Circuit found a coextensive liberty interest of the child in relation to the parent, i.e., the parent-child relationship and the child-parent relationship. The Ninth Circuit's analysis is worthy of extensive quotation, ***Smith***, *supra* 818 F.2d at 1418 (A. N1-N7).

Terminating AMH's relationship with the Hes would breach no liberty interest of AMH because she has nothing of interest to her that would be lost. The notion of terminating a nonexistent "relationship" is nonsensical. Genes and DNA create in AMH's real world nothing she could identify as a "relationship."

The fact that the Hes might assert that the termination of their right to have custody of AMH violated a liberty

interest of theirs could not be of less concern to anything of interest in AMH's real world.

Terminating AMH's relationship with Next Friends violates the most valued liberty interest AMH has because she loses everything, including her mental, emotional and physical well-being, i.e., her liberty interest that protects her from being deprived of minimum health, safety and welfare by a court order that, against AMH's interest, forces her to suffer substantial harm.

From AMH's child-parent perspective, her "parental" relationship with Next Friends is as real as her own flesh and bones and is her very link with life.

If AMH is asked whether the Hes are her "parents," she would be expected to answer negatively. If AMH is asked if Next Friends are her parents, she would be expected to answer affirmatively, and her affirmative answer would convey the plethora of all that a child-parent relationship should encompass.

If the Hes were asked if they were the "parents" of AMH, they would answer in the affirmative. But, the parent-child relationship the Hes would be describing is an 8 year removed biological link with an 8 year old stranger.

What constitutionally-based logic could support a conclusion that AMH has no Fourteenth Amendment liberty interest in AMH's child-parent relationship with Next Friends, simply because the Hes have a Fourteenth Amendment liberty interest (inclusive of custody) in the Hes' parent-child relationship?

If the Hes' liberty interest trumped AMH's liberty interest, the lesser would be trumping the greater. Even more, this would be the lesser interest of an adult trumping the greater interest of a child.

Even where antagonistic interests of adults and children are co-equal, the universal jurisprudence in the United States is that the interest of the child must prevail over the competing interest of the adult.

This universal preference in favor of the child's rights is crystal clear in *TCA* §36-1-101(d)("In all cases, when the best interest of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interest of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed.")

In stark contrast, the ruling below resembles a ruling expected in the 1800's when children were little, if anything, more than the property of their made progenitor.

If the Supreme Court can force AMH to so suffer to accomplish the result in this case, what restraint is there if, to accomplish some other goal in the future, the Supreme Court again orders in such a way that it forces children to suffer substantial harm?

Is there any policy so important that, to achieve it, it is constitutional permissible that a court, against the interest of a helpless child, could order that the child be traumatized and suffer substantial harm? AMH respectfully suggests

that this is such an inhuman means that no end could ever justify its use, in any civilized society.

If, for the Hes to exercise their right to custody, it were established that AMH would suffer a mental breakdown, from the loss of her familial bond, that would cause her soon after to die, courts from every direction would be doing whatever was necessary to stop the result.

Now, there is nothing but an unstated presumption that the reunification ordered below will not be a life-shortening event for AMH; the Supreme Court found no need for a hearing to find out what is a likely effect. If AMH's life is not likely to be shortened, but her life will only be shattered as she is maimed, psychologically, emotionally and intellectually, is this less offensive to the United States Constitution than a shortened life?

GUARDIANS

For 100 years *TCA* §27-1-113 (A. L1-L2) existed. The Supreme Court, until February 9, 2007, consistently construed §27-1-113 as prohibiting the Supreme Court from ruling contrary to facts found by chancery court and concurred in by the court of appeals.

The concurred-in facts, on the willfulness of the Hes' surrender of their right to custody of AMH, are unmistakable (A. Q1-Q21).

If the Supreme Court had decided the custody issue in compliance with (§27-1-113) as it had consistently construed the statute (A. T1-T2), the Supreme Court would have been bound by the concurred-in findings that the Hes

understandingly surrendered to Guardians the right the Hes had to custody of AMH.

The Supreme Court created new law by overruling all (A. A2-A3) of the cases it previously had decided that construed the statute as it had always construed it.[5] The Supreme Court announced a new construction (A. T1-T2) never before indicated.

The Supreme Court has the prerogative to construe statutes of Tennessee without oversight from this Court. But, the most recent statement of law on point appears as follows in ***Watson's Carpet v. McCormick***, 2007 WL 1314132 (Tenn.Ct.App. Jan. 18, 2007) reading at *9-*10:

> Retrospective effect will be "denied only if such an application would work a hardship upon those who have justifiably relied upon the old precedent." *Marshall v. Marshall*, 670 S.W.2d 213, 215 (Tenn.1984); see generally, S.R. Shapiro, Annotation, *Perspective or Retroactive Operation of Overruling Decision*, 10 A.L.R.3d 1371 (1966). *Hill v. City of Germantown*, 31 S.W.3d 234, 239 (Tenn.2000). **Other rules apply where** the judicial decision at issue

[5] The February 9, 2007 order denying the petition to rehear states that all prior decisions of the Tennessee Supreme Court that are contrary to the new construction were explicitly overruled. Research establishes that, without exception, all of the prior decisions on point were overruled.

overrules a prior **judicial construction of a statute**, *Id.* at 239-40, but the case before us does not involve a statute or its interpretation by the courts.

In ***Hill v. City of Germantown***, 31 S.W.3d 234 (Tenn.2000), the opinion was written by Justice Holder, and, in ***Hill***, Justice Holder wrote, for Chief Justice Baker and Justice Birch in 31 S.W.2d at 239:

> Nevertheless, we expressly held in *Blank v. Olsen*, 662 S.W.2d 324 (Tenn. 1983), that "in the absence of ... an expressed intent [to make it retroactive], the rule is ... that the decision overruling a *judicial construction of a statute* will not be given retroactive effect." *Id.* At 325 (emphasis added) (citing 20 Am.Jur.2d *Courts* § 234 (current version at 20 Am.Jur.2d *Courts* § 175)). We cited with approval authority from other jurisdictions that had held "a judicial interpretation of a statute becomes a part of the statute itself" and that "[a] change in the judicial view of the law by a subsequent decision could not amount to more than a change in the law by legislation, and, of course, could act prospectively only." *Id.* At 326 ... .

Blank v. Olsen, 662 S.W.2d 324, 325-26 (Tenn.1983) expounded the rule further (A. U1-U3).

The rule is exact same rule this Court employs based on this Court's holdings that it is a violation of the Fourteenth Amendment to deprive a litigant of the benefits of a clearly construed statute, in force while the litigant acted in reliance on it, then, after it is too late in the litigation for the litigant to change course, take the benefit of the statute away.

This Court addressed this subject in ***Fleming v. Fleming,*** 264 U.S. 29, 31 (1924) (AU3-U4).

In ***Tidal Oil Co. v Flanagan*** 263 U.S. 444, 453 (1924), after citing the five earlier opinions, restated the proposition (A. U4).

Where a taxpayer, under a statute clearly construed at the time, was entitled to recover payments, a supreme court repudiated the prior construction of the statute, and substituted a new judicial construction of the statute. Under the new construction, the taxpayer was not entitled to recover. The supreme court applied the new construction retrospectively to the taxpayer-litigant.

This Court held, in ***Montana National Bank of Billings v. Yellowstone County, Mont.***, 276 U.S. 499, 504-05 (1928), that the taxpayer-litigant, by a state court's repudiation of the court's prior construction, cannot be deprived of the benefit the statute provided before the repudiation (A. U5).

In a case where the South Carolina Supreme Court repudiated its prior construction of a criminal trespass statute and retroactively applied its new construction to a defendant charged for conduct that preceded the new construction, this Court, in ***Bouie v. City Of Colombia,*** 378 U.S. 347, 352-53, (1964), addressed the constitutional evil that the Fourteenth Amendment prohibits (A. U5-U9) when a state court does this.

To better understand how the holdings in ***Bouie*** apply here, it must be pointed out that the prior cases construing §27-1-113 were all clear and easily understood.

What this Court said of ***Bouie***, in ***Rogers v. Tennessee***, 532 U.S. 451, 458, 460, 462 (2001), is significant (A. U9-U10).

While ***Bouie*** and ***Rogers*** involve penal statutes, as shown, the rule applies equally to civil statutes, and there is nothing less egregious about the retroactively applied change of law below. The custody of AMH with Guardians was completely secure, if only the concurred in facts rule so many times reaffirmed as the Supreme Court's construction of §27-1-113 Guardians rightly placed confidence, after the court of appeals concurred in the trial court's facts in the Supreme Court's consistently repeated construction of §27-1-113. For Guardians and AMH, the custody issue was resolved when the court of appeals judgment (A. F1) was filed.

Law securing AMH's custody with Guardians was so clear that Guardians would have been justified in not even

filing an appellee's brief in the Supreme Court. However, AMH filed an appellee's brief pointing to the security of her custody that §27-1-113 (A. 11-110) gave her.

Guardians filed a petition to rehear and pointed to the error in not following the dictates of §27-1-113.

In response, the Supreme Court overruled all of its prior cases construing §27-1-113. Then, the Supreme Court violated the Fourteenth Amendment's guaranty applying the new statutory construction retrospectively.

Guardians would have been foolish to expect that the Supreme Court might rule ignoring its prior construction of §27-1-113.

But, even if Guardians had speculated that the Supreme Court might not follow the law, Guardians were secure in the Fourteenth Amendment's protection that, if the Supreme Court overruled its precedent, it could not retrospectively apply the new statutory construction to Guardians.

How could Guardians have ever predicted not only that the Supreme Court would overrule all of its prior cases but, then, would announce new law and, then, in the face of the Fourteenth Amendment, apply the new statutory construction retrospectively to Guardians?

CONCLUSION

AMH is the human being who is the only person who is totally without blame, fault and could not have changed anything that transpired; yet, AMH is the one person the Supreme Court singled out to be substantially harmed and

traumatized. The Supreme Court said that the substantial harm must be suffered by AMH because the Tennessee court system did not function as it should have. The responsibility to keep the Tennessee court system from malfunctioning rests with the Supreme Court. Why must an innocent 8 year old child suffer because the Supreme Court did not? Why is it not cruel to force AMH to suffer for this failure of the Supreme Court?

AMH contends that she has been dealt with by the decision as if she were property (e.g., an animal or, worse still, a pre-Civil War slave).

For government officials to cause harm to children, in ways and for reasons that provide no benefit to the child, is so antagonistic to the dictates of basic humanity that to tolerate as law a mandate that a child suffer substantial harm to satisfy a "right" of adults who, to the child, are strangers should shake the Constitution at its roots.

Perhaps as repugnant to the very soul of civilized jurisprudence is the baseline notion that clearly construed statutory law on which trial courts, intermediate courts and litigants have justifiably depended to adjudicate and secure statutory rights cannot be changed, especially at a point after it is impossible for the litigant to chart a course consistent with the new law, then, apply the new law retrospectively to deprive a litigant a right the statute, before the change, guaranteed the litigant.

APPENDIX

SUPREME COURT OF TENNESSEE FILINGS:

Order Denying Petition for Rehearing,
filed 02/09/07 ..... A1 - A4

Order Denying Motion to Stay
Issuance of Mandate,
filed 02/09/07 ..... B1 - B1

Mandate,
filed 02/09/07 ..... C1 - C2

Opinion,
filed 01/23/07 ..... D1 - D40

Judgment,
filed 01/23/07 ..... E1 - E3

COURT OF APPEALS OF TENNESSEE FILINGS:

Opinion and Judgment,
filed 11/23/05 ..... F1 - F252

Partial Dissent,
filed 11/23/05 ..... G1 - G45

CHANCERY COURT OF TENNESSEE FILINGS:

Memorandum Opinion and Order,
filed 05/12/04 ..... H1 - H101

APPENDIX, Continued:

SUPREME COURT OF TENNESSEE FILINGS:

Excerpts of Brief of Guardian Ad Litem, filed 08/08/06 ..... I1 - I10

OTHER:

JUVENILE COURT FILINGS:

Excerpt of Transcript of 04/11/07 Morning Hearing, ... J1 - J3

Excerpt of Transcript of 04/11/07 Afternoon Hearing ..... K1 - K5

STATUTES:

TCA § 27-1-113 ..... L1 - L2

QUOTES FROM CASES:

In Re Jasmon O v. Gavin O. 878 P.2d 1297 (Cal. 1994) reh. den. 10/27/94 ..... M1 - M7

Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987) ..... N1 - N7

Sorentino v. Family & Children's Society of Elizabeth, 367 A.2d 1168, 1170 (N.J. 1976) ..... O1 - O3

APPENDIX, Continued:

OTHER, Continued:

Sorentino v. Family & Children's Society of Elizabeth,
378 A.2d 18 (N.J. 1977) 18, 20 ..... P1 - P3

Concurred-In Facts Chart ..... Q1 - Q21

Hypothetical Dialogue ..... R1 - R8

Footnote 4 ..... S1 - S1

Tennessee Supreme Court Decisions
Construing § 27-1-113 ..... T1 - T2

Retroactive Applications of New
Construction of Statutes ..... U1 - U10

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

IN RE ADOPTION OF A.M.H.

No. W2004-01225-SC-RII-PT - Filed: February 9, 2007

FOR PUBLICATION

ORDER

The Bakers have filed a Petition to Rehear under Rule 39 of the Tennessee Rules of Appellate Procedure. While we decline to grant the petition, we take this opportunity to clarify two issues in this case: the applicability of the concurrent findings doctrine and the continued participation of the guardian ad litem and the attorney ad litem.

The first of these issues concenlS the "concurrent findings doctrine." The Bakers, relying upon Tennessee Code Annotated section 27-1-113, contend that the trial court made certain findings of fact and that we are bound by those factual determinations in which the Court of Appeals has concurred. Tennessee Code Annotated section 27-1-113 provides in pertinent part as follows:

> In all cases tried on the facts in a chancery court and afterwards brought for review to the court of appeals, the court of appeals shall, to

> the extent that the facts are not stipulated or are not concluded by the findings of the jury, make and file written findings of fact, which thereupon shall become a part of the record. *Before any such findings [of fact] shall become final, reasonable opportunity shall be afforded the parties to examine the findings and to ask for different or additional findings.... To the extent that the findings of the chancery court and the court of appeals concur, they shall, if there be any evidence to support them, be conclusive upon any review of the facts in the supreme court: to the extent that they do not concur, they shall be open to examination in that court.*

(Emphasis added).

The terms of the statute are instructive. First, the court of appeals must reduce its findings of fact to writing. The intermediate appellate court must then provide a reasonable opportunity for the parties to examine the findings and to request different or additional findings. The record does not reflect that the Court of Appeals in this case complied with the statute. We therefore conclude that Tennessee Code Annotated section 27-1-113 has no application to this case. Because the statute's requirements were not met, Rule 13(d) of the Tennessee Rules of Appellate Procedure governs the standard of review upon appeal. To the extent that this Court has interpreted Tennessee Code Annotated section 27 -1-113

more broadly, those cases are overruled as inconsistent with Rule 13(d) of the Tennessee Rules of Appellate Procedure.

Furthermore, while the trial court made findings of fact in this case, many of those findings are not necessary to the determination of whether the Hes abandoned A.M.H. by failing to visit her during a four-month period. The material facts surrounding the alleged abandonment are largely undisputed. To the extent that such facts are capable of dispute, Rule 13(d) of the Tennessee Rules of Appellate Procedure governs our standard of review upon appeal. Rule 13(d) states in pertinent part, "[R]eview of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The facts in our opinion concerning the issue of abandonment reflect the preponderance of the evidence in this case.

The Bakers also assert that we have left A.M.H. "lawyerless" by relieving the prior guardian ad litem and attorney ad litem from "any further participation in proceedings concerning A.M.H." The Bakers misapprehend the procedural posture of this case. Upon remand, the chancery court has twelve days to transfer this case to the Juvenile Court of Shelby County. The juvenile court is vested with such authority as is necessary to "consider, prepare, and implement a plan to resolve the pending custody matter with a view towards reunification of A.M.H. with her natural

parents." We have not limited the juvenile court's authority to consider reasonable requests for representation by a guardian ad litem or an attorney ad litem on behalf of A.M.H. This Court, however, is not the proper forum for such requests.

Accordingly, the Bakers' Petition to Rehear is denied. Costs are taxed to the petitioners, Jerry 1. Baker and Louise K. Baker, and their sureties, for which execution may issue if necessary.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

IN RE ADOPTION OF A.M.H.

No. W2004-01225-SC-RII-PT - Filed: February 9, 2007

FOR PUBLICATION

ORDER

This Court has carefully considered the Motion to Stay Issuance of Mandate filed in this cause and concludes that it should be denied.

PER CURIAM

Supreme Court - Western Division
Supreme Court Building
#6 Highway 45 By Pass
P.O. Box 909
Jackson, TN 38302-0909
(731) 423-5840

Larry E. Parrish
The Crescent Center
6075 Poplar Avenue, Suite 420
Memphis, TN 38119-4763

Date Printed:	02/09/2007
Notice Date:	02/09/2007
Case Style:	In Re: Adoption of A.M.H, DOB 1/28/99 Jerry L. Baker and wife, Louise Baker v. Shao-Qiang (Jack) He and wife, Qin (Casey) Luo
Case Number:	W2004-01225-SC-R11-PT
Action:	Notice Date: 02/09/2007 Notice: Mandate Issued Sent::
Trial Court:	Shelby County Chancery Court
Trial Court Number:	CH-01-1302-III

This Office has issued the mandate in the above-styled appeal. The mandate consists of certified copies of the judgment, any order as to costs, and a copy of the opinion. This Office has

BEST AVAILABLE COPY

transmitted the mandate in its entirety to the trial court clerk. This action signifies the end of the appeal For the information of the trial court clerk, the Appellate Court Clerk's office will not accept any filing from any parties or their counsel after issuance of mandate except those requesting recall of the mandate, those related to withdrawing the record or portions thereof and those related to the assessment of costs.

SAT

C: Linda Lynn Walls Holmes
Douglas Earl Dimond
Richard Alan Gordon
David A. Siegel

Appellate Court Clerk's web page:
http://www.tncourts.gov/geninfo/AppellClerk/AppellateClerksWeb.htm

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
October 4,2006 Session Heard at Nashville

IN RE ADOPTION OF A.M.H.

Appeal by Permission from the Court of Appeals,
Western Section Chancery Court for Shelby County
No. CH-01-1302-III
Robert L. Childers, Chancellor by Designation

No. W2004-01225-SC-R11-PT
Filed on January 23, 2007

This case concerns the termination of parental rights. The appellants, who are the parents, seek reversal of the termination of their parental rights to the care and custody of their daughter, A.M.H. The trial court predicated the termination on the ground that the parents abandoned A.M.H. by willfully failing to visit her for four months. First, we hold that the statute of repose under section 36-1-113(q) of the Tennessee Code Annotated does not deprive this Court of jurisdiction to review the termination of parental rights. Second, because the undisputed evidence shows that there was animosity between the parties and that the parents were actively pursuing custody of A.M.H. through legal proceedings during the four-month period immediately preceding the filing of the petition for termination of parental rights, we hold that the trial court erred in finding a willful failure to visit. Finally, we conclude that the parents' consent to transfer custody and guardianship of A.M.H. to the appellees was not made with knowledge of the consequences of the transfer. Therefore, according the parents those superior rights to the custody of their child that constitutional law mandates, only a showing of substantial harm that

threatens the child's welfare may deprive the parents of the care and custody of A.M.H. Although A.M.H. has now been with the appellees for more than seven years, six of those years elapsed after the parents' first unsuccessful legal filing to regain custody. Evidence that A.M.H. will be harmed from a change in custody because she has lived and bonded with the Bakers during the pendency of the litigation does not constitute the substantial harm required to prevent the parents from regaining custody. For the reasons discussed below, the judgment of the Court of Appeals is reversed, and this case is remanded to the chancery court to be expeditiously transferred to the Juvenile Court of Shelby County for the entry of an order that implements a plan to reunite A.M.H. with her natural parents.

Tenn. R. App. P. 11 Appeal by Permission;
Judgment of the Court of Appeals Reversed;
Case Remanded

WILLIAM M. BARKER, C.J., delivered the opinion of the court, in which JANICE M. HOLDER, CORNELIA A. CLARK, and GARY R. WADE, JJ., and ADOLPHO A. BIRCH, JR., SP.J., joined.

David A. Siegel, Memphis, Tennessee, for the appellant, Shao-Qiang ("Jack") He.

Richard A Gordon, Memphis, Tennessee, for the appellant, Qin ("Casey") Luo.

Larry E. Parrish, Memphis, Tennessee, for the appellees, Jerry L. Baker and Louise K. Baker.

Paul G. Summers, Attorney General and Reporter; Michael Moore, Solicitor General; and Douglas Earl Dimond, Senior Counsel, Nashville, Tennessee, for the appellee, State of Tennessee.

Christina A Zawisza, Memphis, Tennessee, for the amici curiae, University of Memphis Child Advocacy Clinic, Loyola University Childlaw Center, Vanderbilt University Legal Clinic, and Tennessee Alliance for Legal Services.

Linda L. Holmes, Memphis, Tennessee, for guardian ad litem, Kimbrough Mullins.

OPINION

Facts and Procedural History

The parents of A.M.H. are citizens of China. Prior to the child's birth, her father, Shao-Qiang ("Jack") He, was a tenured college professor in China. He moved to the United States on a student visa in 1995 to attend Arizona State University. In 1997, he enrolled in an economics doctorate program at the University of Memphis and was awarded a scholarship and a graduate assistant position with a stipend. The mother of A.M.H., Qin ("Casey") Luo, although unmarried, obtained a visa as the father's wife. The mother arrived in the United States on June 30, 1998; the parents did not marry immediately. The mother speaks little English and has used an interpreter throughout these proceedings.

The mother became pregnant in July of 1998. Soon after, a student at the University of Memphis filed a complaint with the university alleging that the father had attempted to

rape her. Although the father consistently denied the allegations and was eventually acquitted by a jury, this charge had severe consequences. Because of the charge, the father was terminated from his graduate assistant position in October of 1998. With no job or stipend, the parents had very little income and no health insurance; in late 1998, they decided to meet with a birth-parent counselor at Mid-South Christian Services (hereinafter "Mid-South"). At the trial of this termination petition, the birth-parent counselor from Mid-South testified that the parents initially expressed a desire that their unborn child be adopted by a financially stable family. The father testified that the parents were seeking social services when they went to Mid-South and did not ask to place their child for adoption. This is consistent with the testimony of the Mid-South counselor, who testified that she discussed with the parents placing A.M.H. in foster care through the Tennessee Department of Children's Services but advised against this option because of the potential "risks" and "difficulties." The Mid-South counselor testified that she told the parents, "once the child went into the care of the State, the child could be there for a long time" because "there are certain things that have to be in place before [the Department of Children's Services] returns the child to the biological parents." The father further testified that the parents agreed to consider adoption as an option at the counselor's suggestion. On December 1, 1998, the parents met with a couple interested in adopting a child through Mid-South.

On January 28, 1999, A.M.H. was born. Shortly after the birth, the mother told the Mid-South counselor that A.M.H. was not to be placed for adoption. The hospital

records verify that A.M.H. was not to be placed for adoption. Instead, the parents desired help with the care of their child for six to twelve months while they tried to regain financial stability. Consequently, on February 24, 1999, when A.M.H. was four weeks old, the parents went to juvenile court and explained that they could not afford to care for A.M.H. and wanted temporary foster care. Rather than contacting the Department of Children's Services, the juvenile court officer telephoned Mid-South, which agreed to provide three months of foster care for A.M.H. That same day, the parents entered into an "interim care agreement" with Mid-South that specifically stated that the agreement did not terminate parental rights. A.M.H. was placed in the foster care home of the appellees, Jerry L. Baker and Louise K. Baker, the couple now seeking the termination of parental rights and the adoption of A.M.H. The parents of A.M.H. and the Bakers orally agreed that the parents could visit A.M.H. once a week. The father of A.M.H. testified to the following:

> I was thinking that at that time, you know, we did not have health insurance for our child, and we had the darkest time - hardship. So I would think that for the benefit of the child, maybe it's a good idea to stay with the Bakers for three months because the Bakers told me - Mr. Baker told me very clearly that they are Christian families generation after generation. We are just like brothers and sisters, and that's God's will, for him to get to know me. So I was very moved to tears by Mr. Baker's remarks.

After placing A.M.H. with the Bakers, the parents visited her regularly in the Bakers' home, consistently bringing food and gifts and taking photographs at every visit. On one occasion, the parents were allowed to take A.M.H. out of the Bakers' home for the day. The father had obtained a part-time job with the University of Memphis, and, despite the absence of an order requiring the parents to provide child support to Mid-South or the Bakers, the parents attempted to give the Bakers $300 in cash for the care of A.M.H.; the Bakers would not accept the money. In April of 1999, the father was arrested on the attempted rape charge. Although the father was released the next day, he was fired from his part-time job with the university, which he had obtained after losing his graduate assistant position. After the father's firing, the parents were living on the approximate $400 a month that the mother earned as a waitress.

Because their financial condition was not improving, the parents decided to send A.M.H. to China to have relatives care for her temporarily. The father testified that in May of 1999, Mr. Baker told the father that it was a bad idea to send A.M.H. to China and that the Bakers would keep A.M.H. until the father graduated from the university. The Bakers testified that the father asked them to adopt A.M.H., but the mother opposed the adoption. In a meeting at the Bakers' home, the Bakers told the father that they were unwilling to keep A.M.H. as long-term foster parents but wanted to adopt her. According to the Bakers' testimony, because the parents of A.M.H. would not agree to an adoption, they entered into an oral agreement after the father of A.M.H. led them in prayer and the parties dis-cussed the issue. Under the oral agreement, the Bakers would raise A.M.H. until she was eighteen, and the parents of A.M.H. would retain their

parental rights. The Mid-South counselor testified that, in a meeting with Mid-South's attorney and the Bakers on May 19, 1999, the father of A.M.H. stated that the mother and he wanted to continue the custody arrangement but maintain their parental rights. The Bakers then pursued a legal change of custody.

On June 2, 1999, the father of A.M.H., the Bakers, the Mid-South counselor, and Mid-South's attorney met to explain to the father the legal effect of granting the Bakers temporary custody. According to Mrs. Baker's testimony, the father was told by the attorney "that this could go for one year or it could go for 18 years." Mid-South's attorney testified that he informed the parents that by giving up custody, "unless everybody consents to give the custody back ... anybody that gives up even temporary custody takes a risk that ... the court may not give custody back." He further testified:

> And I'm sure I would have given some hypotheticals about what some of those reasons [for not returning custody to the parents] might be; you know, that if the couple that wanted custody back [engaged in] drug use or alcohol use or some kind of abuse or not having a place for the child to live or not - you know, those sort of things could prevent you from getting custody back.

On June 4, 1999, Mid-South's attorney went with the Bakers and the parents of A.M.H. to the Juvenile Court of Shelby County to obtain a consent order transferring custody of A.M.H. to the Bakers. A juvenile court officer drafted the

"Petition for Custody" and a "Consent Order Awarding Custody." The consent order does not mention child support or visitation. A juvenile court interpreter, the juvenile court officer, and Mid-South's attorney spoke with the mother privately before she signed the order; the mother was told that the order would enable the Bakers to obtain health insurance for A.M.H. The juvenile court officer who drafted the consent order testified that the mother was very concerned that the arrangement be temporary and that the parents would continue to have "open visitation" with A.M.H. through the duration of the Bakers' custody.

Despite the mother's concerns that the arrangement be temporary, the juvenile court officer added a guardian-ship provision to the consent order so that the Bakers could obtain medical insurance for A.M.H. Mrs. Baker stated that there was no discussion of guardianship during the meeting between the Bakers and the parents of A.M.H. prior to the execution of the consent order in juvenile court.

The Bakers testified that as part of the custody agreement, the parents agreed that the Bakers would raise A.M.H. until she was eighteen years old and that the child would refer to the Bakers as "mommy" and "daddy." Contrary to the Bakers' testimony, the juvenile court officer testified that the parents were not agreeing that the Bakers could raise A.M.H. until she was eighteen years old. Indeed, the juvenile court officer testified that the mother "was fairly adamant that at some point she wanted her child back." The mother testified as follows: "I was told I can get my daughter back at any time. I asked him three or four times about that." Finally, the juvenile court interpreter, Pastor Kenny Yao,

testified that the mother understood the agreement to be temporary and for the purpose of obtaining medical insurance for A.M.H. An order transferring custody and awarding guardianship was entered by consent; there was no court hearing on the matter.

After the consent order was signed on June 4, 1999, Mrs. Baker began keeping notes after each weekly visit by the parents. Her first entry was on June 5, 1999, when she wrote, "Gained custody on June 4th, 1999." She documented the date, the exact time of arrival, and the time of departure of the parents after every visit. She documented the gifts the parents brought (such as food, formula, diapers, and books) and the acts of the parents, noting if they were attentive to A.M.H. or engaged in what she considered mis-conduct (such as giving the baby "inappropriate" things like a small necklace). Although the notes written by Mrs. Baker characterize the father as "pushy" and the mother as emotional, the notes generally portray the parents striving in the face of fairly adverse conditions to maintain a relationship with their child, familiarize her with their Chinese culture, and ensure her health and safety.

On September 20, 1999, the University of Memphis suspended the father from taking further classes for the remainder of the academic year and required him to complete sexual abuse counseling. Because of the suspension, the father lost his status as a student and was subject to deportation. A university representative testified that after the suspension ended, the father returned to school in the fall of 2000 and completed his degree requirements; however,

because he owed the university money, the father had not been awarded his degree at the time of trial.

On October 3,1999, the parents asked the Bakers if they could take A.M.H. out for the day on the next Sunday. The Bakers refused, and the mother began crying. Mrs. Baker's notes for that visit include the following:

> We would like to get visits to every other week. We felt like they would wean away, but the last 2 visits we could see Casey [the mother] is wanting to come more. If Jack [the father] confronts us with the visit we are going to tell him this is the way its going to be and set rules for him. He is very pushy and overbearing.

The mother, through an interpreter at the trial, described her impressions during this time period as follows:

> At [the time of the custody hearing, the Bakers] pretend to be really nice. I didn't know it was a trap, but after I signed the documents, they tear their pretended face .... In the first three months when we went and visit our daughter, they were really nice to us .... When they tricked us to sign the temporary custody order, they immediately tear their pretend face, and they picked the most inconvenient time for us [to visit] and they tried to shrink: the time [of the visits] as short as they can.

Mrs. Baker testified that she told the parents that A.M.H. could go out with the parents when she was old enough to make a decision on whether she wanted to go out with the parents or not. The juvenile court officer testified that during this time period, the parents contacted her several times complaining about their visitation arrangement and expressing their desire to regain custody of A.M.H.

In November of 1999, when A.M.H. was ten months old, the father of A.M.H. asked Mr. Baker to return A.M.H. to the parents' custody. Mr. Baker responded that he and Mrs. Baker did not want to return A.M.H. and told the father not to mention his request to Mrs. Baker because she was pregnant. Mr. Baker also stated that he would hold the father responsible if Mrs. Baker had a miscarriage because she was worried about the custody situation. The father testified that he felt threatened and intimidated. The parents decided to wait for the Bakers' child to be born before pursuing the return of their daughter. The relationship between the parties continued to deteriorate; nevertheless, the parents continued to visit consistently and bring gifts. On February 21, 2000, the Bakers' child was born. Also, during this time period, the mother of A.M.H. became pregnant with her second child, and the father was contacted by immigration officials.

On May 3, 2000, the parents went to the Juvenile Court of Shelby County and signed a petition alleging a change in circumstances and seeking custody of A.M.H. Mr. Baker contacted the father and requested a meeting; they met but could not reach an agreement as to custody or visitation. The Bakers contacted Mid-South's attorney to represent them at the custody hearing and to pursue the termination of the

parents' rights to A.M.H. The parents, who were still having financial difficulties, did not have an attorney at the hearing to regain custody. At the hearing on June 28, 2000, the Court Appointed Special Advocate submitted a report recommending that the Bakers retain custody and the parents be allowed supervised visitation twice a week for four hours each visit. The father told the referee that they planned to send their daughter to China to live with relatives. After briefly questioning the father, the referee denied the petition. Upon Mid-South's attorney's advice, the Bakers did not file a petition to terminate parental rights at this time.

The parents did not appeal the custody order. However, they continued to visit their daughter at the Bakers' home despite the increase in animosity between the parties. During that period, the father began working in Georgia and could not attend all of the visits with A.M.H. On August 1, 2000, after the mother refused Mrs. Baker's request that she leave one of these visits by a certain time, the police were called. After this incident, the father quit his job in Georgia because he feared their visitation with A.M.H. was in jeopardy. The parents asked the Bakers for a visit with A.M.H. at a restaurant rather than at the Bakers' home; the Bakers refused. However, after the mother of A.M.H. gave birth to her second child on October 28,2000, the Bakers were very helpful to the parents of A.M.H., providing transportation and food and facilitating the parents' care of their baby boy.

Prior to January 28, 2001, A.M.H.'s second birthday, the parents requested to take their daughter for a family picture; they invited the Bakers to go with them and made an

appointment at a photography studio. When the parents arrived with their son at the Bakers' home, they were told A.M.H. could not go because she was sick. The father testified to the following:

> Number one, that was our child - our first daughter's birthday - second birthday. That was a special day. Number two, according to Chinese culture, on birthday, family picture together is of much significance - whole family .... That was such a special day for us. We made appointment. If she was sick or if you had a doctor's appointment, why didn't you call me and tell me in advance, one day or two days, so that we made a rescheduled appointment .... They knew my phone number. So I was upset. I said, "Okay, today, we could not accept any more excuse." That's what I said to them .... Jerry Baker was so -he was, oh, so upset. He was not very happy .... I said, "Today, we cannot accept any more excuses. We want the - we want to take our daughter to the studio for family to get a picture made, period." That's what I said, "Period," and he noticed that I was very pushy, very insistent, and he said, "you've got to leave here. You've got to leave here." I said, "I won't - not today, I won't leave here. Until we have picture made, I won't leave here." And then he said, "I'm going to call the police." I said, "Call the police. I won't leave here. "

The police were called, and the officer told the parents not to return to the Bakers' house or they would be arrested. The Bakers' answers to interrogatories state that the parents were instructed by the police "not to return to the home of the Bakers." The police officer testified at trial that, even though it was late afternoon when he arrived at the Bakers' home, he would have told the parents not to return "that day." There were no further visits. On June 20, 2001, four months and five days later, the Bakers filed a petition to terminate parental rights to A.M.H. This four-month lapse in visitation is the ground upon which the chancery court found abandonment of A.M.H. and terminated the parents' rights to their daughter.

Although the parents no longer pursued a relationship with A.M.H. through visits in the Bakers' home, they soon contacted the juvenile court and asked for assistance in regaining custody of A.M.H. On February 15,2001, eighteen days after their last visit with A.M.H., the parents sent a letter to the juvenile court and to the media setting forth the history of the case and stating that they wanted A.M.H. returned so that they could return to China. The father testified that they went to juvenile court twice between February and April. On April 9, 2001, the parents again went to juvenile court; the mother was sobbing. The parents told the juvenile court officer that they did not understand what they were doing when they signed the consent order. The court officer prepared a petition to regain custody for the parents. The

Bakers were notified of the petition on May 4, 2001.[1] Mr. Baker telephoned the father, and they met. In the meeting, the father said that he wanted his daughter to be returned and that she could visit with the Bakers twice a week. Mr. Baker told the father that he would not agree to returning A.M.H. The father then offered to leave custody with the Bakers if he and the mother could bring A.M.H. home one day every other week. Ultimately, no agreement was reached.

In May of 2001, the parents of A.M.H. sent their seven-month-old son to China to live with relatives because they feared that if the father was convicted of attempted rape, their son would be taken from them. The parents, both of whom now worked in restaurants, sent the relatives money every few months for their son's care. (On December 1, 2003, the son returned from China to live with the parents.)

On June 6, 2001, the parents appeared in juvenile court for the hearing on their custody petition. Had the matter been heard that day as scheduled, the four-month period required for statutory abandonment would not have run. The hearing was rescheduled, however, to accommodate the Bakers' attorney; understandably, the parents were very sad and disappointed. The parents appeared for the rescheduled hearing on June 22, 2001. The father testified, "We went there on time - actually, we went there before eight o'clock, my wife and I. We were very eager. We went there. We were ready to have the hearing, and we thought we could have our child back that day." However, two days previously (which

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[1]The petition to regain custody was not stamped as filed until May 29, 2001.

was four months and five days after the parents' last visit with A.M.H.), the Bakers had filed a petition for adoption and termination of parental rights in chancery court. Consequently, rather than hear the modification of the custody petition, the juvenile court transferred the custody case to chancery court; the father testified, "Of course, my heart was broken." The chancery court did not rule on this custody petition until its final order terminating parental rights.[2]

The filing of the petition for adoption and termination of parental rights by the Bakers began chancery court proceedings that would span thirty-two months and generate a technical record containing eleven volumes of motions, responses, and orders. The procedural history recounted in this opinion omits much of the actual litigation. The grounds alleged in the original petition seeking termination of the parents' rights were the parents' abandonment of A.M.H. by willfully failing to visit and the parents' abandonment of A.M.H. by willfully failing to support the child financially. The petition was later amended to assert grounds of termination based on the father's lack of legal status as a parent, the parents' mental incompetence, and the persistence of conditions preventing the child's reunification with the parents. The parents hired an attorney, and the Bakers continued to be represented by Mid-South' s attorney until they hired a separate attorney in September of 2001. A guardian ad litem was appointed; she recommended that the parents not be allowed to visit with A.M.H. until the adoption

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[2] -A third petition for modification of the consent order awarding custody was filed by the parents on September 12, 2003; it was denied by the chancery court on May 12, 2004.

proceedings were completed.[3] Around October of 2001, the guardian ad litem contacted Dr. David B. Goldstein, a clinical psychologist, and requested that he perform an evaluation of A.M.H. Dr. Goldstein testified that the guardian ad litem asked him to evaluate A.M.H. in order to address "the effects of removing a child from a well-bonded family situation and the effects of removing a child from their culture and placing them in a different culture." The court then appointed Dr. Goldstein to evaluate A.M.H. and the parties.

On January 7, 2002, the parents of A.M.H. married. The father took a DNA test that established that he was A.M.H.'s father. And during this time, the mother became pregnant with a third child. On February 7,2002, upon the guardian ad litem's motion, the chancery court ordered the parents to surrender A.M.H.'s passport to the court and, upon the Bakers' motion, ordered the parents to pay $15,000 to the court for the guardian ad litem's fees, the DNA test, and the costs of the psychological evaluations. The father testified that it was impossible for the parents to pay the ordered $15,000 in fees, "especially after [the Bakers' attorney] subpoenaed us and all the local Chinese restaurants, and my wife lost her job as a waitress." The parents did not produce the passport. On February 8, 2002, the court entered an order (drafted by the Bakers' attorney) to show cause why the parents should not be found in contempt for refusing to surrender the passport. The order also appointed the Bakers as A.M.H.'s guardians as defined in section 36-1-102(24) and

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[3] Her recommendation was based on the fact that the parents had not seen A.M.H. for six months.

(25) of the Tennessee Code Annotated and ordered that the parents have no contact with their daughter.

None of the witnesses could explain why the court ordered that the parents have no contact with their daughter. It may have been intended as a means of forcing the parents to surrender A.M.H.'s passport; however, it is also possible that the court ordered no contact upon the advice of the guardian ad litem. The guardian ad litem testified that she did not recommend visitation because "the status quo was that the child had not seen her biological parents in a number of months, I didn't believe that throwing the child into something different than the status quo was necessarily in her best interest." The guardian ad litem continued to oppose visitation and reunification with the parents through-out the proceedings. She believed that A.M.H. was attached to the Bakers and considered them to be her parents, although the guardian ad litem had never seen A.M.H. with her biological parents. She further stated that she had read a book about Chinese girls being placed in orphanages and consequently was concerned that the parents wanted to return to China:

> From the very beginning of the case, it was very clear to me that [the parents'] intention was that if the child were returned to them, they wanted to go back to China. They have never said anything different than that. They have always said that when this case is over they would like to take her back .... I honestly can't tell the Court today I know to an absolute certainty what kind of life she would have there. This book that I read caused me some concerns.

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The parents ultimately paid the $15,000. On February 20, 2002, the parents filed a motion for visitation. On February 22, the court ordered the parents incarcerated for failing to surrender A.M.H.'s passport; the parents surrendered the passport. Although there was a preliminary hearing on the matter in March 2002, the court did not rule on the motion for visitation, stating that it assumed there must have been a reason for the no contact order and that it was unable to decide the issue without more evidence. At the hearing, the court expressed concern about the parents' interest in press coverage. The father testified:

> You asked me why [we contacted the press]. Because at that time, I knew very clearly that I could not get justice from [the judge]. I could not get it, and I was in a desperate situation. All I could turn to for help was the media. I was trying to get the media's attention in order to help me to get my daughter back.

In July of 2002, Dr. Goldstein submitted a report that found that A.M.H., who by this time was three years old and had not seen her parents in over a year, considered the Bakers her psychological parents and concluded that a child who experiences loss in early childhood is at a greater risk of developing serious psychological disorders. On September 9,2002, the parents of A.M.H. had their third child, a daughter.

In February of 2003, the father of A.M.H. was acquitted by a jury of the charges stemming from the student's complaint of attempted rape. Several motions were filed

during this time period, and this Court specially designated a chancellor to preside over the case. On September 23, 2003, the parents were allowed a visit with A.M.H., which was monitored by Dr. Goldstein. The video of this session, in which the parents see their child for the first time in two-and-a-half years, shows the love the parents have for their child; understandably, A.M.H. does not react to them as parental figures. On September 29, 2003, the parents filed another motion for visitation. On November 7, 2003, the parents filed a renewed motion for visitation. On December 1,2003, the parents saw their daughter with the Bakers' children at a Wal-Mart. The mother said to the children, "That's my daughter. Give me my daughter." The oldest Baker child grabbed A.M.H. and screamed for help; the police were called. On January 27, 2004, the designated chancellor ruled on the motions for visitation and ordered that the parents were to have no contact with A.M.H. until after the trial.

On February 23, 2004, almost three years after the parents filed their petition to regain custody in juvenile court, the trial on the petition to modify the custody order and the petition for adoption and termination of parental rights began. At the time of trial, because Mr. Baker had lost his prior job, the Bakers were $374,829 in debt, paid $1,795 per month for rent, were liable for loan payments on three cars, and had approximately $1,000 in their checking account. Mr. Baker testified that he currently was earning $110,000 per year. The father of A.M.H. was earning $2,300 per month as the manager of a restaurant; the mother of A.M.H. was staying at home with their youngest daughter; and their son was in day care so that he could learn English.

Several psychologists testified at the trial. None of these witnesses opined that harm would result from continued contact between A.M.H. and her parents or from expanded visitation. Dr. Goldstein, the court-appointed expert, testified that he did not conduct evaluations of the child or the parties (even though evaluations were ordered) and that he did not investigate the attachment between A.M.H. and her parents prior to writing his report. On September 23,2003, he did monitor the videotaped session with the parents and A.M.H. Dr. Goldstein testified, "I did assume that there was very little attachment to the [parents] based upon the information that I had and based also on my knowledge of psychological development." Dr. Goldstein did not bring all of his notes to the trial. He testified that he was unable to say whether visitation should take place and unable to give any opinion as to custody. Dr. Goldstein limited his opinion to the best interest of the child, and even as to that topic, he would not render an opinion on whether having no further contact with her parents would be in A.M.H.'s best interest. The chancery court found Dr. Goldstein to be "highly qualified, highly respected .... Very knowledgeable, honest and a forthright witness."

At the trial, the parents of A.M.H. introduced evidence from three psychologists and a Chinese culture expert to refute the inference that the parents intended for the Bakers to raise A.M.H., to refute the opinion that A.M.H. had no attachment to her parents, and to show that the parents presented no abnormal psychological traits. The psychological experts offered by the parents pointed out what they perceived to be flaws in Dr. Goldstein's process and report. Dr. John Robert Hutson testified that he had reviewed Dr.

Goldstein's deposition and report and that Dr. Goldstein did no evaluations of the parties. Dr. Hutson opined that there should be ongoing contact between the parents and A.M.H. Both Dr. Hutson and another psychologist, Dr. John Victor Ciocca, reviewed the video of the parents visiting with A.M.H. and found that the child responded favorably to the parents and the parents acted appropriately. The testimony offered by the parents was critical of the court's prevention of visitation with the child and of Dr. Goldstein's failure to perform certain evaluations. However, the court found this testimony to be "of little assistance to the court" because Drs. Hutson and Ciocca had never personally interviewed A.M.H.

The Chinese culture expert testified to the importance of "family" to the Chinese and the practice among Chinese students of allowing family members to care for their children temporarily. The chancery court found that the Chinese expert lacked credibility, despite similar testimony given by Pastor Kenny Yao, who the court found to be honest and without bias. Pastor Yao, who served as the mother's interpreter on several occasions (including in juvenile court when the petition to transfer temporary custody to the Bakers was drafted) testified as follows: "There is substantial difference between temporary custody and adoption in the Chinese culture. Adoption is you're giving the parental rights of the baby ... to someone else .... But temporary custody is someone is helping to take care of the baby while you are unable to take care of the baby." He also testified that when the consent order was signed by the mother in juvenile court, he understood and translated the term "temporary custody" to the parents as follows: "[custody means taking care. Temporary means not permanent."

Additionally, the parents introduced expert testimony from Dr. Yih-Jia Chang, who spoke fluent Mandarin Chinese. Dr. Chang performed a psychological evaluation (based on Chinese norms) on A.M.H.'s parents. She testified that they were both within the normal range. Dr. Chang testified that the father "may have a tendency to please others," "tends to go along with society," has a tendency to "seldom show dissatisfaction with authority," and appreciates various forms of artistic expression. She testified that the mother's impulse control was within the normal range and that she had a "high energy level." Dr. Chang's report also states that it is a common practice in China for a child to be placed temporarily in the care of extended family. Dr. Chang testified that she believed the evaluations were valid because the answers were consistent with her determinations while meeting with each parent. Dr. Chang testified that the evaluations were valid even though each parent was left alone in the room to fill out the evaluation questions while she met with the other parent and even though the answer sheets of both parents were left in the room. The chancery court ruled that "the underlying facts or data relied upon by Dr. Chang in forming her opinion" regarding the parents' mental health "indicate a lack of trustworthiness"; accordingly, the court excluded Dr. Chang's testimony.

Finally, the parents introduced several witnesses to counter the Bakers' portrayal of the father as manipulative and the mother as unreasonable and overly emotional. One of these witnesses, who had previously adopted two Chinese children through Mid-South and for whom the mother had worked as a babysitter, testified that the mother was very good with children and a nice person. On cross-examination,

after establishing that this witness thought highly of Mid-South, financially supported Mid-South through donations, and knew that the Bakers would be a good placement for a child if they had been approved by Mid-South, the Bakers' attorney asked for the witness's opinion on what the outcome of the case should be. The witness stated:

> I believe that [the parents] should have [A.M.H.]. I know it will cause hurt and pain no matter what happens, and I feel for all concerned, but I do think that [the parents] deserve to have their child back. ... [K]nowing [the parents] from their relationship with my children and my-self, I just would find it in the child's best interest to go back to her birth parents.

After considering this evidence, the chancery court concluded that the parents are manipulative and dishonest people who appeared to have no intent to raise A.M.H. but have used the child from birth for financial gain and to avoid deportation. The chancery court found that the parents willfully abandoned A.M.H. by failing to visit or provide support for the four months immediately preceding the filing of the Bakers' petition to terminate parental rights. The court concluded that it would be in A.M.H.'s best interest to terminate parental rights and allow her to remain with the Bakers. The chancery court also concluded that the father was not the legal father of A.M.H. at the time that the petition to terminate parental rights was filed and terminated his parental rights under five of the six grounds under section 36-1-113 (g)(9)(A) of the

Tennessee Code Annotated.[4] The chancery court rejected all

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[4] Subsection 36-1-113 (g)(9)(A) provides as follows:

The parental rights of any person who ... is not the legal parent or guardian of a child or who is described in § 36-1-117(b) or ©) may also be terminated based upon anyone (1) or more of the following additional grounds:

(1) The person has failed, without good cause or excuse, to pay a reasonable share of prenatal, natal, and postnatal expenses involving the birth of the child in accordance with the person's financial means promptly upon the person's receipt of notice of the child's impending birth;

(ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;

(iii) The person has failed to seek reasonable visitation with the child, and if visitation has been granted, has failed to visit altogether, or has engaged in only token visitation, as defined in 36-1-102(1)©);

(iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;

(v) Placing custody of the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child; or

(vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child's mother, or as required in § 36-2-318(j), or after making a claim of paternity pursuant to § 36-1-117©)(3).

Tenn. Code Ann. § 36-1-113 (2005).

of the other grounds for termination raised by the Bakers. Further, the chancery court ruled that the petition to modify custody filed in the juvenile court on May 29,2001, "is not well taken and should be denied and dismissed." The petition for adoption was held in abeyance.

The Court of Appeals reversed the chancery court's ruling that the parents had abandoned A.M.H. in willfully failing to support her; it also reversed the chancery court's ruling that the father was not the legal parent of A.M.H. when the termination petition was filed. However, the Court of Appeals affirmed the termination based on the parents' willful failure to visit their daughter for four months and held that termination was in the best interest of A.M.H. Judge Holly M. Kirby dissented, stating that she would reverse the termination of the parents' rights to A.M.H. because the failure to visit was not willful. The Bakers do not appeal the lower courts' rulings on the unsuccessful grounds for termination. Consequently, the sole ground for termination presented in this Court is abandonment grounded on the parents' willful failure to visit A.M.H. for a period of four consecutive months immediately preceding the filing of the petition to terminate parental rights.

Analysis
I. Jurisdiction

The Bakers argue that this appeal should be dismissed under section 36-1-113(q) of the Tennessee Code Annotated, a statute of repose. The statute provides as follows:

> After the entry of the order terminating parental rights, no party to the proceeding, nor anyone claiming under such party, may later question the validity of the termination proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, except based upon a timely appeal of the termination order as may be allowed by law; and in no event, for any reason, shall a termination of parental rights be overturned by any court or collaterally attacked by any person or entity after one (1) year from the date of the entry of the final order of termination. This provision is intended as a statute of repose.

Tenn. Code Ann. § 36-1-113 (q) (2005). The Bakers argue that this Court does not have jurisdiction because the appeal of this matter has not been completed within one year of the entry of the chancery court's order terminating parental rights.

The primary rule in construing statutes is to ascertain and give effect to the intention or purpose of the legislature as expressed in the statute. State ex rel. Rector v. Wilkes, 436 S.W.2d 425, 427 (Tenn. 1968). Unless the statute is ambiguous, legislative intent is determined "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000); see also Sallee v. Barrett, 171 S.W.3d 822, 828 (Tenn. 2005); Austin v. Memphis Publ'g Co., 655 S.W.2d 146, 148-49

(Tenn. 1983). A statute is ambiguous if the natural and ordinary meaning of the language used may be interpreted to reach contrary results, "requir[ing] resort elsewhere to ascertain legislative intent." Austin, 655 S.W.2d at 148; LeTellier v. LeTellier, 40 S.W.3d 490,498 (Tenn. 2001). Where the statutory language is not ambiguous, however, the plain and ordinary meaning of the statute must be given effect. Calaway ex rel. Calaway v. Schucker, 193 S.W.3d 509, 516 (Tenn. 2005).

Subsection 36-1-113 (q) of the Tennessee Code Annotated is not ambiguous. The statute plainly states that the trial court's "order" terminating parental rights may not be challenged by a party to the proceeding *"except based upon a timely appeal* of the termination order as may be allowed by law." Tenn. Code Ann. § 36-1-113(q) (emphasis added). Here, the parents of A.M.H. timely appealed the order of termination; therefore, they are allowed to question the validity of the termination proceedings. Subsection 36-1-113(q) further states that a termination order may not be overturned or collaterally attacked after one year from the date of the entry of "the final order." A judgment does not become final until "all direct appeals have been exhausted including an application for appeal or for certiorari to the Tennessee or United States supreme court." Cf. Tenn. Code Ann. 39-17-901 (5) (2003). Because the one-year limitation under subsection 36-1-113(q) does not begin to run until the entry of a final order, we conclude the language used in the statute does not indicate an intent to affect a parent's ability to timely pursue a direct appeal.

Moreover, the legislature specifies that the "provision is intended as a statute of repose." Id. § 36-1-113(q). A statute of repose does not limit the time for appellate courts to hear and rule on a case that has been appealed timely; [5] a statute of repose limits the time within which an action may be filed. Calaway, 193 S.W.3d at 515; Penley v. Honda Motor Co., 31 S.W.3d 181, 184 (Tenn. 2000). Therefore, by designating subsection 36-1-113(q) "a statute of repose," the legislature demonstrated an intent that the statute serve as an absolute limit on the time in which a challenge to a final order of termination may be filed, not a limit on the time for a direct appeal.

2. Standard of Review

Parties seeking to terminate parental rights must prove two elements. First, they have the burden of proving that there exists a statutory ground for termination. Tenn. Code Ann. § 36-1-113©)(1) (2005); Jones v. Garrett, 92 S.W.3d 835,838 (Tenn. 2002). Second, they must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann.

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[5] Although the legislature has the power to enact statutes of limitation barring relief on complaints filed beyond the limitations period. see Maestas v. Sofamor Danek Group, Inc., 33 S.W.3d 805, 809 (Tenn. 2000), it does not have the authority to enact legislation affecting the courts' ability to process a timely filed cause of action. Because we find the statute does not limit judicial review of a timely appeal, we do not need to address whether limiting judicial review of a timely filed appeal would violate due process or "'constitute an impermissible encroachment upon the judicial branch of government.' " See Lynch v. City of Jellico, 205 S.W.3d 384, 393 (Tenn. 2006) (quotations omitted).

§ 36-1-113©)(2) (2005); In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006). Both of these elements must be established by clear and convincing evidence. See Tenn. Code Ann. § 36-1-113©)(1) (2005); In re Valentine, 79 S.W.3d 539, 546 (Tenn. 2002).

On appeal, the trial court's findings of fact are reviewed de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); In re F.R.R., 193 S.W.3d at 530. In weighing the preponderance of the evidence, great weight is afforded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. See Jones, 92 S.W.3d at 838. Questions of law, however, are reviewed de novo with no presumption of correctness. Langschmidt v. Langschmidt, 81 S.W.3d 741, 744-45 (Tenn. 2002).

3. Termination of Parental Rights

The sole ground for termination presented in this appeal is the parents' willful abandonment of A.M.H. by failing to visit her for four months preceding the filing of the termination petition. It is well established that both the United States and Tennessee Constitutions protect parents' rights to the custody and care of their children. See Hawk v. Hawk, 855 S.W.2d 573,578-79 (Tenn. 1993) ("[P]arental rights constitute a fundamental liberty interest."). Therefore, before a parent's rights to a child may be terminated by a court, "there must be a showing that the parent is unfit or that substantial harm to the child will result if parental rights are not terminated." In re Swanson, 2 S.W.3d 180, 188 (Tenn.

'99). By statute, the legislature has designated bandonment" as a valid ground for the termination of rental rights. Tenn. Code Ann. § 36-1-113(g)(1) (2005). ıe applicable definition of "abandonment" is found in :tion 36-1-102(1) of the Tennessee Code Annotated, which ›vides as follows:

> (A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:
>
> (I) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child;
>
> ....
>
> (E) For purposes of this subdivision (1), "willfully failed to visit" means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;
>
> (G) "Abandonment" and "abandonment of an infant" do not have any other definition except that

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> which is set forth in this section, it being the intent of the general assembly to establish the only grounds for abandonment by statutory definition. Specifically, it shall not be required that a parent be shown to have evinced a settled purpose to forego all parental rights and responsibilities in order for a determination of abandonment to be made. Decisions of any court to the contrary are hereby legislatively overruled.

Tenn. Code Ann. § 36-1-102(1)(A)(2001). A parent who has abandoned a child by "willfully" failing to visit is "unfit" under constitutional standards. In re Swanson, 2 S.W.3d at 188. Therefore, under those circumstances, termination of parental rights is appropriate. See, e.g., In re F.R.R., 193 S.W.3d at 530. Where the failure to visit is not willful, however, a failure to visit a child for four months does not constitute abandonment. We have held that a parent who attempted to visit and maintain relations with his child, but was thwarted by the acts of others and circumstances beyond his control, did not willfully abandon his child. See In re Swanson, 2 S.W.3d at 189.

Here, we are presented with a situation in which the parents of A.M.H. actively pursued legal proceedings to regain custody of A.M.H. during the "abandonment" period but failed to visit for a period of four consecutive months immediately prior to the filing of a petition for termination of parental rights. As a question of law, the trial court's ruling that the facts of this case sufficiently support the termination ground of willful abandonment are reviewed de novo with no presumption of correctness. Cf. In re Valentine, 79 S.W.3d at

548 (concluding that "[s]ubstantial noncompliance is a question of law which we review de novo with no presumption of correctness."). We hold that the evidence in this case does not support a finding that the parents intentionally abandoned A.M.H..

Disregarding the witnesses that the trial court found to lack credibility, the record clearly shows the following undisputed facts:

> (1) On January 28, 2001, the parents visited A.M.H. in the home of the Bakers;
>
> (2) The parents became upset when they could not take A.M.H. with them to sit for a family portrait;
>
> (3) The parents refused to leave A.M.H. until a police officer arrived and told them to leave;
>
> (4) During the subsequent four months and five days prior to the filing of the petition for termination, the parents pursued help in regaining the custody of their child by contacting the juvenile court and the local media;
>
> (5) During this time, the parents initiated two juvenile court hearings on a petition to regain custody of A.M.H.;
>
> (6) The first hearing was thwarted by the Bakers' request for a continuance; and

(7) The second hearing was thwarted by the Bakers' initiation of proceedings in chancery court.

This undisputed evidence does not support a finding that the parents' failure to visit A.M.H. was willful. Where, as here, the parents' visits with their child have resulted in enmity between the parties and where the parents redirect their efforts at maintaining a parent-child relationship to the courts the evidence does not support a "willful failure to visit" as a ground for abandonment.[6] Therefore, we hold that there has been no willful abandonment and reverse the termination of parental rights. Accordingly, the Petition for Adoption and Termination of Parental Rights is dismissed.[7]

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[6] Citing section 27-1-113 of the Tennessee Code Annotated, the Bakers argue that this Court must find abandonment because it is bound by the concurrent findings of fact of the trial court and the Court of Appeals. We conclude, however, that the statute is inapplicable to the dispositive question in this case-whether the parents' failure to visit constituted a willful abandonment because that question is a question of law, not a question of fact.

Because we conclude that there are no grounds for terminating parental rights, it is unnecessary to reach the best interest of the child analysis. See In re D.L.B., 118 S.W.3d 360, 368 (Tenn. 2003); Tenn. Code Ann. § 36-1-1-113©) (2005).

[7] In addition to the question of whether the evidence supports termination under the statute, the parents of A.M.H. present several constitutional grounds for reversal. Because this case is fully resolved on statutory grounds, we decline to address these issues. See Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995) ("[U]nder Tennessee law, courts do not decide

4. Custody

When this Court reverses a lower court's termination of parental rights in a contest between parents and non-parents for custody, we usually remand the case to the trial court for the preparation and implementation of a plan to return custody of the child to the parent. In this case, however, we must first address the consent order entered by the juvenile court in June of 1999 that transferred the custody and guardianship of A.M.H. to the Bakers. Unless we conclude that the consent order is unenforceable, the parents of A.M.H. have no superior rights to the custody of A.M.H. The parents argue that the consent order is unenforceable and ask that they be granted custody.

In an initial proceeding, natural parents have superior rights in relation to non-parents who seeking custody under article I, section 8 of the Tennessee Constitution. Blair v. Badenhope, 77 S.W.3d 137, 141 (Tenn. 2002). But "absent extraordinary circumstances," parents are not entitled to superior rights when seeking to modify a valid order placing custody with a non-parent "even when that order resulted from the parent's voluntary relinquishment of custody to the non-parent." Id. at 143. Despite this rule, we have recognized four circumstances in which a natural parent continues to enjoy a presumption of superior rights to custody:

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constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties.").

> (1) When no order exists that transfers custody from the natural parent;
>
> (2) When the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent;
>
> (3) When the order transferring custody from the natural parent is invalid on its face; and
>
> (4) When the natural parent cedes only temporary and informal custody to the non-parents.

Id. Recognizing the possibility that in the informal setting of juvenile court unrepresented parents could enter into a formal order without understanding the actual effect of transferring custody, we have explained that it is only a parent's "voluntary transfer of custody to a non-parent, *with knowledge of the consequences of that transfer.*" that will defeat a parent's claim to superior rights of custody. Id. at 147 (emphasis added).

The evidence establishes that the parents were misled as to the consequences of a change in custody and uninformed about the guardianship provision and, therefore, did not enter into the agreement with knowledge of the consequences of the transfer of custody and guardianship. Even if we only consider the testimony from witnesses that the chancery court found to be credible, the evidence shows that the parents were instructed that the transfer of custody was temporary and that barring inappropriate conduct by the parents, custody would be returned to the parents. Mrs. Baker testified that, the parents were informed that the custody arrangement "could go for one year or it could go for eighteen years." Mid-South' s

attorney testified that, he informed the father of A.M.H. that if the Bakers did not consent to return A.M.H. to the parents' custody, the court might not return custody in situations such as where "the couple that wanted custody back [engaged in] drug use or alcohol use or some kind of abuse or [did] not [have] a place for the child to live," The juvenile court officer who drafted the consent order testified that, the mother was told that the custody transfer would be temporary and that the parents would have "open visitation." The juvenile court officer also testified that the mother asked several times for verification that the transfer would be temporary before she would sign the consent order. The translator for the parties, Pastor Yao, testified that the mother understood the agreement to be temporary and for the purpose of obtaining medical insurance for A.M.H.

This evidence overwhelmingly shows that the parents' voluntary relinquishment of custody was entered as a temporary measure to provide health insurance for A.M.H. with the full intent that custody would be returned. Therefore, we hold that the parents of A.M.H. did not voluntarily transfer custody and guardianship of A.M.H. to the Bakers with know ledge of the consequences and, therefore, are entitled to superior rights to custody. As we stated in Blair:

> Where a natural parent voluntarily relinquishes custody without knowledge of the effect of that act, then it cannot be said that these rights [to the care and custody of one's child] were accorded the protection demanded by the Constitution. As such, application of the superior rights doctrine in a subsequent modification proceeding would be justified.

Blair, 77 S.W.3d at 148 n.3. Accordingly, we hereby revoke the parental consent to the change of custody and guardianship, and consider the competing claims of the parties, giving due deference to the parents' superior rights to the care and custody of A.M.H.

Under the superior rights doctrine, "a natural parent may only be deprived of custody of a child upon a showing of substantial harm to the child." In re Askew, 993 S.W.2d 1,4 (Tenn. 1999). Therefore, the determination of a custodial dispute between a parent and a non-parent rests on a determination of whether there is substantial harm threatening a child's welfare if the child returns to the parents. Only then may a court find a sufficiently compelling justification for the infringement of the parents' fundamental right to raise a child as they see fit. See id. at 3.

Here, the only evidence of substantial harm arises from the delay caused by the protracted litigation and the failure of the court system to protect the parent-child relationship throughout the proceedings. Evidence that A.M.H. will be harmed from a change in custody because she has lived and bonded with the Bakers cannot constitute the substantial harm required to prevent the parents from regaining custody.[8] We have previously rejected the contention that when a child has been in the custody of a non-

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[8] However, we recognize that such evidence may be relevant to the manner of implementing the transition in custody from the Bakers to the parents and to the possible allowance of visitation with the Bakers.

parent for a significant period of time, a lesser standard may be applied in determining whether parental rights may be terminated. In re Swanson, 2 S.W.3d at 188 n.13. "Such a standard would increase the likelihood for delaying cases in order that the child remain" in the custody of the non-parent. Id. The same reasoning applies in this situation.

Additionally, we note that the testimony concerning the general conditions in China is not relevant to a finding of substantial harm. Financial advantage and affluent surroundings simply may not be a consideration in determining a custody dispute between a parent and a non-parent. See Hawk, 855 S.W.2d at 582 ("[M]ere improve-ment in quality of life is not a compelling state interest and is insufficient to justify invasion of Constitutional rights.") (internal quotation marks and citation omitted). The evidence at trial showed that the parents have overcome many obstacles to achieve financial stability and are ably taking care of their other two children. Given the lack of evidence of a threat of substantial harm to A.M.H. if she is returned to her parents, we conclude that physical custody of A.M.H. must be returned to the parents.

Conclusion

Having found that the trial court erred in terminating Shao-Qiang ("Jack") He's and Qin ("Casey") Luo's parental rights, we dismiss the Petition for Adoption and Termination of Parental Rights and reinstate the parental rights of Shao-Qiang ("Jack") He and Qin ("Casey") Luo. Further, we revoke the parental consent to the change in custody and guardianship, vacate the juvenile court and chancery court

orders concerning visitation, and designate the current custody and guardianship orders as temporary in nature.

The judgment of the Court of Appeals is reversed. As the reinstatement of parental rights resolves the issues presented by the Bakers in chancery court, we remand this case to the chancery court for the transfer of jurisdiction over the remaining issues to the Juvenile Court of Shelby County where the modification of custody hearing originated. We direct the chancery court to complete this transfer within twelve days of the entry of this judgment. Cf. Tenn. Code Ann. § 36-1-118(e)(4)(A) (2005). The Juvenile Court of Shelby County is directed to consider, prepare, and implement a plan to resolve the pending custody matter with a view toward reunification of A.M.H. with her natural parents, Shao-Qiang ("Jack") He and Qin ("Casey") Luo, in a manner that minimizes trauma to the child.

The attorney ad litem and guardian ad litem are hereby ordered relieved of any further participation in proceedings concerning A.M.H.

The costs of this appeal are taxed to the appellees, Jerry L. Baker and Louise K. Baker, for which execution may issue if necessary. The Clerk of this Court is directed to send a copy of this opinion and judgment to the Juvenile Court of Shelby County.

WILLIAM M. BARKER, CHIEF JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

October 4, 2006 Session Heard at Nashville

IN RE ADOPTION OF A.M.H.

Appeal by Permission from the Court of Appeals,
Western Section Chancery Court for Shelby County
No. CH-01-1302-III Robert L. Childers,
Chancellor by Designations

No. W2004-01225-SC-RII-PT

JUDGMENT

This case was heard upon the record on appeal from the Court of Appeals, application for permission to appeal having been granted. Upon consideration ofthe record and briefs and argument of counsel, this Court is of the opinion that Tennessee Code Annotated section 36-1-113(q) does not deprive this Court of jurisdiction to review the termination of parental rights. Because the parents were actively pursuing custody of A.M.H. through legal proceedings during the four-month period immediately preceding the filing of the petition for termination of parental rights, we hold that the trial court erred in finding a willful failure to visit. Furthermore, we conclude that the parents' consent to transfer custody and guardianship of A.M.H. to the appellees was not

made with knowledge of the consequences of the transfer. Therefore, the parents are entitled to superior rights to the custody of A.M.H and only a showing of substantial harm that threatens the child's welfare may deprive the parents of custody. We hold that the Bakers have failed to show the substantial harm required to deprive the parents of A.M.H. of custody.

In accordance with the opinion in this case, it is ordered and adjudged that the judgment of the Court of Appeals is Reversed. We dismiss the Petition for Adoption and Termination of Parental Rights and reinstate the parental rights of Shao-Qiang ("Jack") He and Qin ("Casey") Luo. Further, we revoke the parental consent to the change in custody and guardianship, vacate the juvenile court and chancery court orders concerning visitation, and designate the current custody and guardianship orders as temporary in nature.

This case is remanded to the Chancery Court of Shelby County to be expeditiously transferred within twelve days ofthe entry ofthis judgment to the Juvenile Court of Shelby County to execute this judgment and for further proceedings consistent with our opinion. Cf. Tenn. Code Ann. § 36-1-118(e)(4)(A) (2005). We direct the Juvenile Court of Shelby County to implement a plan to place custody of A.M.H. with her natural parents, Shao-Qiang ("Jack") He and Qin ("Casey") Luo, in a manner that minimizes trauma to A.M.H.

The attorney ad litem and guardian ad litem are hereby ordered relieved of any further participation in proceedings concerning A.M.H.

Costs of this appeal shall be assessed to the appellees, Jerry L. Baker and Louise K. Baker, for which execution may issue if necessary. The Clerk ofthis Court is directed to send a copy ofthis opinion and judgment to the Juvenile Court of Shelby County.

PER CURIAM

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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON FEBRUARY 16, 2005 Session

IN RE: ADOPTION OF A.M.H., A Minor

JERRY L. BAKER and wife, LOUISE K. BAKER
v.
SHAO-QIANG (JACK) HE and
wife, QIN (CASEY) LUO

Direct Appeal from the Chancery Court for Shelby County
No. CH-01-1302-III Robert L. Childers, Chancellor
By Designation

No. W2004-01225-COA-R3-PT - Filed November 23,2005

In this appeal, we are called upon to evaluate the trial court's decision to terminate the parental rights of the biological parents to a minor child. The biological parents are Chinese immigrants who are presently in this country illegally and are subject to deportation proceedings. Shortly after coming to the United States, the biological parents had a daughter. Facing financial difficulties at the time of their daughter's birth, the parents decided to place their daughter in the care of an adoption agency until their financial situation improved. The agency placed the child with foster parents who agreed to care for the child over an initial three month period. At the conclusion of the three month foster care period, the

biological parents agreed to the entry of a consent order by the juvenile court transferring custody of the child to the foster parents. The biological parents continued to visit with their daughter at the home of the custodial non-parents approximately once each week for one hour each visit. However, they paid no child support to the custodial non-parents. The biological parents subsequently filed a petition to modify the juvenile court's custody order seeking to regain custody of their daughter, which the court denied. Thereafter, the biological parents continued to visit their daughter with the same frequency as before. On one day in particular, the biological parents asked to take their daughter for a family portrait, and the custodial non-parents refused their request. When the biological parents refused to leave the custodial non-parents' home, the police were called. After speaking with the police, the biological parents left the home and never returned to visit their daughter citing their fear of arrest. A short time after this incident, the biological parents filed a second petition to modify the juvenile court's custody order. In response, the custodial non-parents filed a petition to adopt the child and to terminate the biological parents' parental rights in the chancery court, primarily relying on the ground of abandonment. As a result, the biological parents' petition to modify the custody order was transferred to the chancery court. Following a lengthy and tortured procedural history, the chancery court held a bench trial in the matter and subsequently entered an order terminating the biological

parents' parental rights. The biological parents filed a timely appeal to this Court. We affirm in part and reverse in part the decisions of the chancery court in this case. However, in light of our decisions on certain issues presented in this case, we need not remand this case to the chancery court for further proceedings.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed in Part; Reversed in Part

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., joined, and HOLLY M. KIRBY, J., dissented.

David A. Siegel, Memphis, TN, for Appellant, Shao-Qiang (Jack) He

Richard A. Gordon, Memphis, TN, for Appellant, Qin (Casey) Luo

Larry E. Parrish, Memphis, TN, for Appellees

Paul G. Summers, Attorney General and Reporter, Douglas Earl Dimond, Senior Counsel, Nashville, TN, In Defense of Challenged Tennessee Statutes

Christina A. Zawisza, Memphis, TN, for Amicus Curiae: Childlaw Center, Vanderbilt Legal Clinic, Child Advocacy Clinic, Tennessee Alliance for Legal Services

Scott A. Kramer, Memphis, TN, for Amicus Curiae: Greater Seattle Chapter of the Organization of Chinese Americans, Inc.

Linda L. Holmes, Memphis, TN, for Guardian Ad Litem, Kimbrough Mullins

OPINION

I.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Hes Enter the United States

Shao-Qiang (Jack) He ("Father") was born on July 18, 1964 in the Peoples Republic of China ("China"). From 1979 to 1985, Father pursued his bachelor's degree at a university in China. Upon completing his bachelor's degree, Father taught at a high school in Hunan, China. From 1986 to 1998, Father worked toward obtaining his master's degree from Hunan University in teaching English as a second language. After he received his master's degree, the Chinese government assigned Father to teach English courses at the University of Nanjing, where he continued to teach as a tenured professor from 1990 until 1995. In March of 1995, Father came to the United States to pursue a master's degree in teaching English as a second language at Arizona State University. Father entered the United States on a student visa, and he received a full scholarship to attend Arizona State

University. Father attended Arizona State University from 1995 until 1997, and he returned to the university in 2000 to defend his master's thesis. In August of 1997, Father enrolled at the University of Memphis to pursue a doctorate degree in economics. Father received a full scholarship to attend the University of Memphis, which included a stipend in the amount of $1,050.00 each month for working as a teaching/research assistant for approximately twenty (20) hours each week. Father subsequently abandoned his doctoral degree and changed his course of study to pursue a master's degree in management information systems.

After coming to the United States, Father returned to China in May of 1998 to visit for approximately one month. Qin (Casey) Luo ("Mother" or, collectively with Father, "the Hes" or "Appellants") was born in China on March 21,1968. Mother and Father never met in person prior to Father's return trip to China, but they did communicate through telephone calls and email for six to seven months prior to their first meeting. During his return trip to China in May of 1998, Mr. He met Mother in person. According to Mother, Father mailed her some material in 1998 instructing her to go to the United States Embassy in China to secure a visa, and he returned to China to assist her with securing the visa. In order to assist Mother in coming to this country, Father submitted a form to the University of Memphis indicating that he and

Mother were married.* Mother and Father indicated on their immigration documents that they were legally married in China. Mother was able to secure a visa as the wife of a student, and she entered the United States in June of 1998. In fact, the Hes were not legally married in China before Mother came to the United States, therefore, Mother has been an illegal alien since she entered the United States. In a subsequent deposition, Father testified that his intent was to get Mother into the country without ever having married her in China.

B. The Birth o/A.M.H. and the Hes' Financial Difficulties

When she entered the United States, Mother could speak very little English. She began working as a waitress in a Chinese restaurant shortly after arriving in this country. earning approximately $200 to $300 per month. In July of 1998, Father learned that Mother was pregnant. Between the time Mother entered the United States and October of 1998, the Hes' finances remained stable. On October 11, 1998, Father worked as a computer lab assistant at the University of Memphis. According to Father, another Chinese student approached him and asked for assistance with her studies. Father recounted that the student asked to borrow money, and he refused her request. On October 19,1998, the student filed

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* Father married his first wife in 1990, and they divorced a he end of 1995 or in 1996.

a complaint against Father with the campus police department alleging that Father sexually assaulted her. As a result of the compliant being filed, Kathryn Story ("Ms. Story"), the Associate Dean of Judicial and Ethical Programs for the University of Memphis at the time, launched an investigation. During the pendency of the investigation, Ms. Story reported that Mother came to her office toward the end of 1998 and began yelling, calling her a "racist devil." Ms. Story called the campus police, and an ambulance was summoned for Mother. Subsequent to the sexual assault complaint being filed, the University of Memphis decided to terminate Father's graduate assistantship position, resulting in the loss of his $1,050.00 monthly stipend.

After Father lost his stipend, the Hes began to experience financial difficulty. Around Thanksgiving of 1998, the Hes were shopping at a Chinese grocery store in Memphis when they encountered Father's accuser accompanied by two other men. An altercation erupted, and, as a result, Mother lost her balance and fell into a shopping cart. Mother, approximately seven months pregnant at the time, experienced vaginal bleeding and was taken to the hospital. The Hes sought legal counsel to file a lawsuit for the incident in the grocery store, but they never pursued the litigation to a conclusion. As the birth of their child grew nearer, the Hes considered placing the child for adoption. In November or December of 1998, the Hes approached Mid-South Christian Services ("Mid-South"), a licensed child placement agency

providing adoption and foster care services, seeking assistance. The Hes met with Dianne Chunn ("Ms. Chunn"), a birth-parent counselor with Mid-South.

As a birth-parent counselor, Ms. Chunn counseled the Hes on their decision to parent their child or place the child for adoption. Ms. Chunn opened a birth-parent file on the Hes on December 1,1998, which included her notes from conversations with the Hes. In her discussions with the Hes, they represented themselves as a married couple, but Ms. Chunn did not request to see their marriage license. In fact, the Hes completed a "Pregnancy Counseling Status Sheet" representing that they were married even though they were not legally married at the time. Ms. Chunn stated that, in one of their conversations, Father expressed concerns about whether he was the biological father of the unborn child. Father subsequently denied making any statements to Ms. Chunn questioning his paternity of the child.

According to Ms. Chunn, the Hes initially expressed their desire to place their unborn child for adoption. When subsequently recounting her discussions with the Hes, Ms. Chunn stated that they expressed their desire to find a family that was financially stable. To that end, Ms. Chunn scheduled a meeting between the Hes and a prospective adoptive family on December 1,1998. Ms. Chunn's notes from January 1, 1999, reflected that Mother felt "cheated" because the prospective family "was not wealthy, as was their request." Her notes also indicated that Father stated that they felt that

the adoptive family should be "taking care of them; visiting, bringing nutritious food, etc." According to Father, he and Mother never wanted to place their unborn child for adoption. He asserted that they simply listened to Ms. Chunn's advice and considered it, but Ms. Chunn pushed for adoption to fill a quota and make money for her agency.

On January 28, 1999, Mother gave birth to a daughter, A.M.H. A.M.H. remained in the hospital for several days while Mother returned home. The hospital "OB Admission Assessment Record" dated January 28,1999 indicated that A.M.H. was not to be placed for adoption. Shortly after Mother gave birth to A.M.H., she conveyed to Ms. Chunn that she did not want to place A.M.H. for adoption. Ms. Chunn met with Mother and Father at their home to discuss different options. According to Ms. Chunn, Father still believed that adoption was the best course of action, while Mother disagreed. On February 22, 1999, Father called Ms. Chunn to report that they were still considering adoption. The following day, Ms. Chunn met with the Hes at their apartment. During their conversation, Father stated that adoption was the best plan for A.M.H., but their alternative course of action was long-term foster care. Father estimated that they would need between six months to one year of long-term foster care for A.M.H. to allow them to reestablish themselves financially. Father told Ms. Chunn that they would go to the juvenile court to inquire about long-term care.

On February 24, 1999, the Hes went to juvenile court and spoke to Sarah Cloud ("Ms. Cloud"), a probation counselor at the time, to explain their inability to care financially for A.M.H. Ms. Cloud called Ms. Chunn that same day to inquire about the situation. Ms. Chunn informed Ms. Cloud that the Hes initially wanted to place A.M.H. for adoption, but they subsequently changed their minds and wanted to place her in foster care. As a result of this call, Ms. Chunn agreed to provide the Hes with three months of foster care for A.M.H. through Mid-South. While Mid-South normally did not provide foster care beyond one month, Ms. Chunn agreed to provide three months of foster care for A.M.H. to allow the Hes to improve their financial situation. On February 24, 1999, the Hes entered into an "Interim Care Agreement and Consent Form" with Mid-South which provided, in relevant part, as follows:

> FINANCIAL ARRANGEMENTS
>
> I understand that 90 days of interim care will be provided my child at no charge to me. If, after 90 days, I have not reached a decision of adoption for my child, I agree to pay MID-SOUTH $____ per day for this care, beginning (review needs at that time), plus any medical expenses incurred on my child's behalf. Interim care can continue at the

discretion of MID-SOUTH when there is a case plan which justifies it.

CUSTODY

I understand that this Agreement does not terminate my parental rights, privileges and obligations to my child. By signing this Agreement, I designate MID-SOUTH, its agents and officers, such rights, privileges and obligations which are necessary for my child's well-being from the date of admission until I sign a release requesting termination of care by MID-SOUTH and receive my child from MID-SOUTH, or until such time as I sign a legal surrender of my parental rights, privileges and obligations before a Chancery Court Judge, thereby placing said child with MID-SOUTH for permanent adoptive planning.

My parental rights to this child can only be terminated by due process of law appropriately prescribed by the State of Tennessee.

When Mid-South agreed to perform foster-care, they turned to the next foster family on their list which happened to be

Jerry Baker ("Mr. Baker") and Louise Baker ("Mrs. Baker" or, collectively with Mr. Baker, "the Bakers" or "Appellees").

C. The Hes' Relationship with the Bakers

In 1989, Mrs. Baker underwent a tubal ligation while pregnant with the Bakers' third child. In approximately 1998, the Bakers decided that they wanted another child, and Mrs. Baker underwent a tubal reversal. The Bakers considered adopting a child, but they wanted to try to have a child of their own first. The Bakers previously submitted a "Foster Home Application" to Mid-South in 1997. In response to the question "Why are you interested in providing a foster home?" on the application, the Bakers responded by stating, in relevant part, that they "were first interested in adoption of a newborn, but thought we would try foster care of newborns for a couple of years." According to Mrs. Baker, they were considering adoption, and serving as foster parents allowed them to decide if adoption was something they wanted to pursue. After submitting their application, the Bakers began serving as foster parents for Mid-South. The Bakers served as foster parents for approximately ten different children, and they never considered adopting any of the children placed with them by Mid-South. The extent of their foster care was usually limited to ten days, with the longest period being six weeks, in order to allow Mid-South to finalize the adoption paperwork.

At Mid-South's request, the Bakers began providing foster care for A.M.H. (who was approximately three weeks old at the time) on February 24,1999, for the agreed upon three month period while the Hes decided whether they wanted to pursue adoption. According to Mrs. Baker, she was still attempting to get pregnant, and they did not expect to keep A.M.H. beyond the agreed upon three month foster care period. The Bakers stated that they fully intended to end their involvement at the end of the three month period; either A.M.H. would be returned to the Hes or the Hes would place her with an adoptive family of their choosing.

According to Ms. Chunn, Mid-South customarily allowed the birth parents to visit their child once a week while the child was in foster care, however, she did not participate in any visitation agreement between the Hes and the Bakers. The Bakers and the Hes apparently reached an oral agreement whereby the Hes could visit A.M.H. once a week during the three month foster care period. Pursuant to this agreement, the Hes came to the Bakers' home approximately once a week to visit A.M.H., and they stayed for about an hour each time they visited. Ms. Chunn documented the March 1998 visits by the Hes in her notes. On March 8,1999, Ms. Chunn went with the Hes to visit A.M.H. at the Bakers' home, and she noted that Mother was excited to see A.M.H. Father told Ms. Chunn that Mother was "moving more toward adoption," and Mother would "readily agree" to an adoption if the adoptive family would allow them weekly visits until Mother became

pregnant again. Father informed Ms. Chunn of a Chinese superstition which characterized A.M.H. as less than an ideal child due to her difficult birth. During a visit on March 15, 1999, Ms. Chunn noted that the Hes were excited to see A.M.H., but Mother continued to be hesitant about adoption. On March 30, 1999, Ms. Chunn documented a phone conversation with Father wherein he stated that, while Mother seemed comfortable with adoption, she "wants to maintain guardianship of the child so she can continue in the U.S."

According to Mother, the initial three month foster care period went well, and Mrs. Baker took good care of A.M.H. and taught Mother how to care for her as well. At some point during the three month foster care period, the Hes attempted to pay the Bakers $300, presumably for caring for A.M.H. According to Mrs. Baker, they refused to accept the money because they were paid $6 per day through Mid-South, and their agreement with Mid-South prevented them from accepting money from the foster parents. Mid-South did not have a specific set of rules preventing foster parents from accepting money from the biological parents, and Mid-South did not instruct the biological parents to pay the foster parents. However, it was Mid-South's practice to reimburse the foster parents for caring for a child.

In mid-April of 1999, the Hes decided that they wanted to apply for a passport for A.M.H. so they could send her to China at the end of the three month foster care period. Father informed the Bakers of their intentions, and he

requested their assistance in having A.M.H.' s passport photo taken. Mrs. Baker complied and took A.M.H. to have a passport photo taken, and A.M.H. subsequently received her passport. The Hes attempted to locate someone they could trust to take A.M.H. back to China at the end of three month foster care period, but they were unable to find a suitable person. Father stated that they could not leave to go to China because, without a green card, they would be unable to return. According to the Hes, the Bakers attempted to persuade them to keep A.M.H. in the United States by stating that they could visit her more frequently if she remained in this country. Toward the end of April of 1999, Father was arrested and charged with sexual assault for the incident at the University of Memphis in October of 1998.[2] At the time of his arrest,

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[2] Father was never convicted of the criminal charges leveled against him. The record is not entirely clear as to whether the charges were dismissed or whether Father was acquitted following a jury trial. Stephanie Johnson ("Ms. Johnson"), the assistant district attorney general involved in the criminal case, subsequently stated that the Father's case was set for trial on or around December of 2001. At a hearing during that period, Ms. Johnson learned that Mother had threatened the victim in the case, and she brought this to the attention of the trial judge. The trial judge admonished Mother about communicating with the victim in the case.

In February of 2003, Ms. Johnson attended a motions hearing in preparation for Father's trial. During that hearing, Ms. Johnson learned that Mother had improperly

Father worked part-time at the University of Memphis in a dormitory earning approximately $200 per month, and Mother continued to work part-time as a waitress. After his arrest, the university fired Father from his job at the dormitory.

On May 8,1999, the Hes sent Mrs. Baker a Mother's Day card inside which they wrote the following:

> Dear Louise:
>
> Happy Mothers Day!
>
> You have offered endless love to many children. You are the real Mom of [A.M.H.]. Our thanks to you is beyond expression.
>
> /s/ Jack & Casey
>
> 5/8/99

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communicated with the jury outside the courtroom. Once again, the trial judge admonished her about this conduct as well. Ms. Johnson subsequently learned that a tape of Father's preliminary hearing was unintelligible. As a result, the indictments against Father were dismissed, and the case was returned to the lower court for a new preliminary hearing. In the lower court, Father produced a copy of the tape from the original preliminary hearing, but it was decided to continue with a new preliminary hearing. As the case progressed to trial for the second time, Mr. He did not show up for an afternoon hearing after the trial judge instructed him to do so. The trial judge subsequently issued a warrant for Mr. He's arrest. In any event, Mr. He was never convicted of the criminal charges brought against him stemming from the October 1998 incident.

While she acknowledged that they sent the card, Mother asserted that she did not intend for the card to mean that she wanted to give up her daughter.

Their inability to secure a suitable person to take A.M.H. back to China at the end of the three month foster care period prompted the Hes to decide to allow A.M.H. to remain with the Bakers. In addition, the Hes were still not able to financially care for A.M.H. at the end of the three month foster care period. According to Mrs. Baker, Father came to them toward the end of the three month foster care period and asked them to adopt A.M.H., but Mother opposed an adoption. On May 19, 1999, Ms. Chunn met with Father to discuss the Hes' future plans for A.M.H. Father stated that they would like to maintain their parental rights, but they wanted to continue the custody arrangement with the Bakers. Ms. Chunn felt that such an arrangement was unrealistic, and she discussed the possible adverse effects long-term foster care could have on A.M.H. after she bonded with the Bakers. Thereafter, Father returned to the Bakers' home to discuss a custody arrangement. The Bakers informed Father that they would not be willing to retain custody of A.M.H. on the basis suggested by Father. According to the Bakers, they entered into an oral agreement with Father whereby the parties agreed that the Bakers would raise A.M.H. until she turned eighteen, and the Hes would retain their parental rights so they could remain in the United States.

On May 24, 1999, Father and Mrs. Baker called Ms. Chunn to inform her that the Bakers were willing to accept temporary custody of A.M.H. Ms. Chunn understood that the parties were in agreement that the Bakers would care for A.M.H. until she reached eighteen years of age. After speaking with Father and Mrs. Baker, Ms. Chunn contacted attorney Kevin Weaver ("Mr. Weaver"). Mr. Weaver previously advised Mid-South on adoption and parental termination matters, and he commonly met with families at the request of Mid-South. Ms. Chunn asked Mr. Weaver to meet with the Bakers and the Hes to discuss the legal implications of the custody arrangement and some of the risks involved.

On June 2,1999, Father, the Bakers, and Ms. Chunn met Mr. Weaver at his office to discuss the custody arrangement. Father informed Mother of the meeting, but Mother did not attend the meeting because she had to work. According to Mr. Weaver, Ms. Chunn, and the Bakers, Father called Mother from the meeting to inquire if they should proceed in her absence. Father subsequently denied that he called Mother from the meeting to make this inquiry. Mr. Weaver, Ms. Chunn, and the Bakers all stated that, after Father concluded his telephone conversation with Mother, he stated that he and Mother were ready to proceed with the agreement, and they should continue with the meeting.

Mr. Weaver did not consider himself to be representing either party at the meeting, and he explained to

the parties at the outset of the meeting that he was not there to represent either party. Mr. Weaver explained how the parties could obtain a consent order for temporary custody, and he told Father that he and Mother would need to obtain a court order to regain custody in the future if everyone was not in agreement to a change of custody. Father subsequently confirmed that Mr. Weaver did indeed tell him that, once they signed a consent order giving the Bakers custody of A.M.H., they would have to go before a court to obtain a change in custody. Mr. Weaver recalled Father asking questions during the meeting, but he did not recall any specific questions. Mr. Weaver did not advise Father that he and Mother could lose their parental rights if they failed to visit A.M.H. or failed to pay child support for A.M.H. for four consecutive months, and no one advised Father to have an attorney present at this meeting. At the conclusion of the meeting, Mr. Weaver felt that everyone understood the process and was satisfied with their decision. According to Mrs. Baker, Father stated that he would inform Mother of what transpired at the meeting and would let them know of their decision. Father subsequently stated that he did not understand the concepts of adoption and custody, and he understood that they were entering the temporary agreement so A.M.H. could be covered under the Bakers' health insurance. Father stated that he spoke to Mother after the agreement and informed her that they would need to sign something to allow A.M.H. to be placed on the Bakers' health insurance.

Mr. Weaver subsequently sent a bill to Mid-South in the amount of $100.00 for his services at the meeting. Ms. Chunn's records indicate that Mid-South forwarded the bill to the Bakers for payment. Ms. Chunn asked the Bakers to reimburse Mid-South for the cost of the meeting because she felt the Hes were not financially able to do so. The Bakers apparently paid the bill for Mr. Weaver's services at the June 2, 1999 meeting.

On June 3, 1999, Ms. Chunn asked Pastor Kenny Yau ("Pastor Yau") to accompany her to the Hes' apartment to speak with Mother. Father was not present at this meeting. On the way to the Hes' apartment, Ms. Chunn indicated that she felt Mother did not completely understand the agreed upon custody arrangement the parties were about to enter into. Ms. Chunn told Pastor Yau that she wanted to ensure that Mother understood the process and was not being forced into anything. She asked Pastor Yau to attend the meeting and translate so Mother could better understand the agreement. Pastor Yau stated that, at the conclusion of the meeting, Mother indicated that she understood the process. Later that day, Father called the Bakers to inform them that they wanted to go ahead with the consent order transferring custody of A.M.H. to the Bakers.

D. The Juvenile Court Order Transferring Custody of A.M.H. to the Bakers

On June 4,1999, the Hes, the Bakers, and Ms. Chunn met at Mid-South's office. From there, they proceeded to the Shelby County Juvenile Court in the Bakers' van. Mr. Weaver did not accompany the parties to juvenile court, and neither party had an attorney present at the meeting in juvenile court. According to Father, Ms. Chunn told the Hes to go to juvenile court, but he did not know why. Since Mother was not present at the meeting with Mr. Weaver, the Bakers requested that Pastor Yau attend the meeting to interpret so that they could ensure that Mother fully understood what was transpiring.

Ms. Cloud met with the parties at juvenile court, and she noted that Mother was "very concerned" that the arrangement would be temporary and not permanent. Ms. Cloud drafted a "Petition for Custody" which provided that the Hes were unable financially to care for A.M.H. at the time, and the Hes were requesting that custody of A.M.H. be transferred to the Bakers. Ms. Cloud also drafted a "Consent Order Awarding Custody" which provided, in relevant part, as follows:

> This cause was before the Court on a sworn petition, and it being evident to the Court by the signatures of the parties that they do place themselves before this Honorable Court and

acknowledge its jurisdiction and admit the following:

1. That [the Hes] have been fully advised of their legal rights and that a hearing before the Court is hereby expressly waived.
2. That all parties agree that it is in the best interest of the child(ren) for custody and guardianship of the person of said child[3] to be awarded to Jerry and Louise Baker, non relatives.
3. That [the Hes] are aware that on this agreement is based the Order of this Court, and that failure to comply herewith, without just cause, places them in contempt of Court and subjects them to such action as the Court deems proper within its jurisdiction.

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[3] Ms. Cloud typed the language "and guardianship of the person of said child" into the document which appears to be a standardized form used by the juvenile court. According to Ms. Cloud, the Bakers did not request the inclusion of the guardianship language, but she inserted the language based upon what she had been told by the parties.

> Having considered the admissions and agreement of the parties, it is the judgment of the Court that a change of custody is in the best interest of the said child(ren).
>
> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that custody and guardianship of the person[4] of said child(ren) be and is hereby awarded to Jerry and Louise Baker, non-relatives with authority to make appropriate plans for the care and supervision of said child(ren).

Before the Hes signed the order, Ms. Cloud, Ms. Chunn, and Pastor Yau took Mother into a separate room to talk privately about the consent order.

According to Ms. Cloud, Mother asked if the arrangement she was agreeing to was a temporary arrangement. Pastor Yau stated that he was shown the consent order, but he did not read it to Mother word for word. Instead, he read the document himself then translated its contents to Mother. He conveyed to Mother that, since they were financially unable to care for A.M.H., another family would

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[4] Ms. Cloud typed the language "and guardianship of the person" into the document at this point as well.

care for her. Furthermore, since they needed health insurance for A.M.H., Mother needed to sign the document to give the Bakers legal authority. According to Mother, Pastor Yau told her that the custody arrangement was only temporary, and she could have A.M.H. returned to her at any time. Pastor Yau felt that he adequately conveyed the order's import to Mother, and Mother never indicated that she did not understand the document and never asked him to repeat anything. Ms. Cloud and Ms. Chunn both described Mother as emotional during their meeting, stating that she was tearful when she signed the order. However, Ms. Chunn and Ms. Cloud both felt that Mother understood the order, which they described as a document providing that the Hes would retain their parental rights, but they would be transferring legal custody of A.M.H. to the Bakers. Ms. Cloud explained that she did not schedule a hearing before the juvenile court judge that day because everyone was in agreement. She stated that it was her standard practice to ensure that the biological parents understood that they would have to go before the juvenile court judge if they did not agree to the order. According to Ms. Cloud, had she thought that the Hes were not sincerely consenting to the order, she would have set the case for a hearing before the juvenile court. On the day that the Hes signed the consent order giving the Bakers custody of A.M.H., the Hes also signed a form provided by Mid-South which effectively removed A.M.H. from Mid-South's care and ended Mid-South's involvement up to that point.

Ms. Cloud stated that no one asked about visitation during the meeting, and the order did not contain any provisions for visitation. The order also did not make provisions for any child support to be paid by the Hes. Pastor Yau stated that he did not recall any discussion during the meeting regarding the law of abandonment, specifically child support or visitation. Ms. Cloud stated, however, that the Bakers told the Hes that they could visit A.M.H. According to Father, the Bakers assured them that they could continue to visit A.M.H. once every week. Regarding child support, the Bakers never told the Hes not to pay child support, but they did not expect the Hes to pay child support since the parties agreed that the Bakers were to raise A.M.H. until she turned eighteen. In fact, the parties agreed that A.M.H. should begin to refer to the Bakers as "mommy" and "daddy" and refer to the Hes as "Jack" and "Casey." During subsequent visits, Father would refer to himself as "Uncle Jack."

After June 4, 1999, the Hes continued to visit A.M.H. at the Baker's home approximately once a week for one hour each visit. On June 5, 1999, the day after the parties signed the consent order, Mrs. Baker began keeping a journal of the Hes' visits to their home. According to Mrs. Baker, the purpose of the journal was to document "everything" that occurred when the Hes visited their home. The Hes were not aware that Mrs. Baker was keeping a journal of their visits, however, Father subsequently acknowledged that he did not dispute the journal's accuracy. The Bakers encouraged the

Hes to interact with A.M.H. during their visits, and Mrs. Baker would show Mother how to feed, change diapers, and generally care for A.M.H. About two weeks after the parties signed the consent order, the Bakers learned that Mrs. Baker was pregnant with the Bakers' fourth child.

Between June 4, 1999, and October of 1999, the He's visits with A.M.H. continued to go well as evidenced by Mrs. Baker's journal. During their June visits, the Hes brought A.M.H. jars of baby food, formula, juice, diapers and two books. In August of 1999, the Bakers told the Hes that they were expecting another child. During a visit on August 28,1999, Mother kept giving A.M.H. a gold chain and glass chime to play with. Mrs. Baker warned Mother that A.M.H. could cut herself or get choked, and Mrs. Baker wrote in her journal that the Hes "have no concept on what babies can do or not do." During a visit on September 11,1999, the Hes expressed excitement over the fact that A.M.H. would have a sibling to grow up with. Mrs. Baker noted in her journal that Mother gave A.M.H. one of her rings to play with, and Mrs. Baker reiterated her concern about A.M.H. putting things in her mouth. On September 30, 1999, Mother brought A.M.H. porridge, and the Bakers allowed A.M.H. to have a few bites.

On September 15,1999, the University of Memphis Social Discipline Committee conducted a hearing on the sexual assault complaint filed against Father. At the conclusion of the hearing, the committee unanimously found Father guilty of violating certain provisions of the Code of

Student Conduct. On September 20, 1999, the committee notified Father by letter that he was suspended from the university for the remainder of the 1999 to 2000 term until the Summer of 2000 term, that he would be placed on trespass status, that he must complete sexual abuse counseling, and that he could not receive his degree during the term of his suspension.[5] As a result of his suspension, Father became an illegal alien subject to deportation proceedings.

On October 3, 1999, Mrs. Baker made an entry in her journal expressing concern over the Hes' request to take A.M.H. out of the Bakers' home during a visit, stating:

> Jack and Casey came at 3:00. [A.M.H.] played for a minute with them and then wanted us. The visit was very discouraging to us. They wanted to see if they could come and get [A.M.H.] and keep her for the day next Sunday. I told them No. She is too little to be away from us. Casey was very distraught, crying very loud. They left soon after. Jack kept telling us that they had friends

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[5] According to Ms. Story, Father completed his degree requirements at the university, but he was unable to obtain his degree due to the suspension. Apparently, the university subsequently awarded Father his degree.

that kept asking about her and a doctor at church wanted to see her. We told them she didn't need to see a doctor and if anyone wanted to see her they could come to our home. We stood strong with this. I think Jack was just trying to please Casey. No words were exchanged. We feel like Jack will try something now. We would like to get visits to every other week. We feel like they would wean away, but the last 2 visits we could see Casey is wanting to come more.

If Jack confronts us with the visit we are going to tell him this is the way its going to be and set rules for him. He is very pushy and overbearing. They are suppose [sic] to com [sic] Thurs, 8:45 AM because Jerry is going to be out of town. Jack will not come to our home without Jerry being here.

Mrs. Baker subsequently stated that they were not going to allow the Hes to take A.M.H. out of their home, and, after the October 3, 1999, visit, they decided to move visitation to every other week. According to Mother, she wanted to see A.M.H. more often, but the Bakers began to change visitation times or make their visits more difficult. However, Mrs. Baker's journal indicated that the Hes occasionally missed visits, rescheduled visits, or the Bakers would miss church to

accommodate the Hes' visits on Sundays. Father subsequently stated that their visits with A.M.H. continued to go well, and they experienced no problems with visitation during this period.

On November 14, 1999, Father called the Bakers to tell them he was bringing a friend from church, Elizabeth Marshall ("Ms. Marshall"), to visit A.M.H. Ms. Marshall previously adopted two Chinese children, and she hired Mother when she was pregnant with A.M.H. to babysit for her. Ms. Marshall was aware that the Bakers were caring for A.M.H., but the Hes did not tell her the specifics of their arrangement with the Bakers. Father asked the Bakers to pretend that they were A.M.H.'s foster parents, not her custodial parents. In fact, Father told Ms. Marshall that the Bakers were A.M.H.'s temporary foster parents. During the visit, Ms. Marshall inquired as to how the Bakers could give up A.M.H. after caring for her for so long, and she referred to A.M.H. as A.M. Marshall. Mrs. Baker got the impression that the Hes had spoken to Ms. Marshall about adopting A.M.H. Ms. Marshall subsequently stated that she had no intention of adopting A.M.H.

At some point in November of 1999, Mother asked Father to approach the Bakers and request that they return custody of A.M.H. to them. Pursuant to Mother's request, Father approached Mr. Baker about their regaining custody of A.M.H. According to Father, Mr. Baker stated that they did not want to return A.M.H. to the Hes, and Mr. Baker asked

him not to mention it again because Mrs. Baker was pregnant, and he did not want to cause a miscarriage. After this conversation, the Hes stated that they no longer felt comfortable with the Bakers, and their relationship began to deteriorate. The Bakers invited the Hes to come to their home on December 22, 1999 to see what A.M.H. received for Christmas. The Hes brought gifts for everyone but A.M.H. On January 28, 2000, the Bakers invited the Hes to their home to celebrate A.M.H.'s birthday. The Hes brought food for everyone and they had birthday cake. The Hes brought A.M.H. a Sesame Street suitcase as a gift. On February 15, 2000, the Hes visited A.M.H. and brought some fish which had bones in it. Mrs. Baker decided not to feed it to A.M.H. On February 21, 2000, Mrs. Baker gave birth to a daughter, Aimee. During a visit on February 28, 2000, the Hes stated that they were pleased that A.M.H. had a new sister. Around this time, Mother became pregnant with the Hes' second child.

On April 26, 2000, the Hes visited the Bakers' home, and Father asked if he could bring a friend from Ohio to visit A.M.H. According to Mrs. Baker's journal entry for that date, Mr. Baker asked Father if he told his friend the truth about A.M.H., and Father said he did not because he was worried about being criticized for telling the truth. Father wondered aloud if he should tell his friend that A.M.H. was "temporary," or if he should tell his friend the whole truth about A.M.H. being "permanent." They encouraged Father to

tell his friend the truth about the situation, and the Bakers invited the Hes' friend to dinner.

E. The Hes' Decision to Petition the Juvenile Court for a Change in Custody

According to Ms. Cloud, the Hes came to juvenile court or called her on the telephone several times after the original agreed upon custody order was entered to complain about their visitation with A.M.H. and to express their desire to regain custody of A.M.H. However, Ms. Cloud could not remember the exact dates of these conversations. On May 3, 2000, the Hes signed a petition seeking to modify the June 4,1999 consent order awarding custody of A.M.H. to the Bakers alleging that a change in circumstances warranted a change in custody. Father subsequently acknowledged that he had been contacted by immigration officials prior to filing the May 2000 petition. According to the Hes, as of the date they filed the petition they were financially able to care for A.M.H. Mrs. Baker's journal entry for May 3, 2000, indicates that the Hes did not apprise the Bakers of their intentions during the visit, and, in fact, the Hes and the Bakers discussed the kinds of lessons they wanted A.M.H. to learn growing up. Ms. Cloud subsequently called Ms. Chunn to inform her that the Hes had filed a petition in the juvenile court to regain custody of A.M.H. In turn, Ms. Chunn called Mrs. Baker on May 4,2000, to alert her of the fact that a petition had been filed. Mrs. Baker called Mr. Baker to inform him of the news.

According to her journal entry for May 4, 2000, the Bakers were "floored" by this news. Mr. Baker called Father that afternoon to arrange a meeting to discuss the Hes' decision to file the petition, and Mr. Baker met Father at the clubhouse of the Hes' apartment complex. During their meeting, Mr. Baker asked Father why they filed the petition. Father responded by stating that Mother insisted on filing the petition to regain custody of A.M.H., but he wanted A.M.H. to remain with the Bakers. Father told Mr. Baker that the Hes planned to "ship" A.M.H. back to China. Father acknowledged the parties' prior oral agreement (that the Bakers would raise A.M.H. until she turned eighteen), but he stated that they needed to discuss changes to the agreement. As Father began talking about the proposed changes, Mr. Baker started writing down what Father proposed. When Mr. Baker indicated that the Bakers would not agree to changing their prior agreement, Father grabbed the paper from Mr. Baker and began writing. The discussion between the two men resulted in the following three options being presented by Father:

> The below options were discussed by Jerry Baker and Jack He.
>
> */ si* Jerry Baker /s/
>
> Jack He 5/4/00

OPTION # 1

That the Bakers and the He's [sic] agree to give [A.M.H.] back to the Hes without disputing custody in court. The Hes agree that in the event the Hes must leave the United States for China they will let the Bakers adopt [A.M.H.] forever.

* The Bakers must agree not to cause the Hes to leave the United States by reporting to the U.S. Government.

OPTION # 2

The Hes agree to stay in Memphis as long as they stay in United States. The Hes will allow the Bakers to have [A.M.H.] for a visit no less than two days per week. * Option 1 and 2 go together.

OPTION # 3

The Bakers and the Hes agree to continue their current agreement with one supplement: the Hes may take [A.M.H.] back home one day every other week. Such agreement will continue for 18 years. The Hes agree to leave [A.M.H.'s] passport to the care of the Bakers.

Mr. Baker wrote the first two options as Father spoke, and Father wrote the third option. Father and Mr. Baker were unable to reach any agreement that day, and the matter remained unresolved.

After the Hes filed their petition to modify the original custody order, the Hes continued to visit A.M.H. at the Bakers' home with the same regularity. On May 7, 2000, the Hes came to the Bakers' home with their friends from Ohio. When Mrs. Baker was alone in the kitchen, Father approached her and stated that "it was going to be alright, that he was going to persuade Casey not to do this." At some point in May of 2000, the Bakers contacted Mr. Weaver.

The Hes' May 2000 petition to modify custody was filed in the juvenile court on June 19, 2000. On June 28,2000, the juvenile court referee held a hearing on the Hes' petition.[6] Mr. Weaver attended the hearing on behalf of the Bakers. The Hes did not hire a lawyer to represent them at the hearing, and no translator was present. Prior to the hearing, the juvenile court appointed a Court Appointed Special Advocate ("CASA") to investigate the Hes' petition to modify custody and determine if they were presently able to provide for A.M.H. The CAS A provided the referee with a copy of his report on the date of the hearing, which provided, in relevant part as follows:

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[6] The record on appeal does not include a transcript of the June 28, 2000 hearing in the juvenile court.

CONCERNS AND EVALUATIONS

Mrs. Luo does not speak English. Therefore, Mr. He translated for her during this CAS A's visit. Presently, both parents stated they want [A.M.H.] back home with them, as they are now able to financially care and provide for her. This CAS A believes that [A.M.H.'s] parents love her very much. However, Mr. He and Mrs. Luo do not seem to understand the serious nature of this matter. For instance, neither parent appears to understand why they have to go to court to regain custody of [A.M.H.]. They do not understand why they have to prove anything. This CASA believes the fact that the mother and the father are not able to speak English is relative to their lack of issues surrounding custody of their child.

Qin (Casey) Luo is four months pregnant with her second child. This CASA is concerned about the added responsibility that a new baby would bring to Mr. He and Mrs. Luo. Presently, the couple lives in a two-bedroom apartment with an adult female roommate named Ping. Ping was not present during this CASA's home visit. The couple plans for both

[A.M.H.] and the new baby to share their existing bedroom with them.

This CASA is concerned that Mr. He and Mrs. Luo want custody of [A.M.H.] reinstated for the purpose of citizenship. The Bakers stated that they were very shocked when [A.M.H.'s] parents filed for custody without first discussing it with them. They stated that they believe Mr. He and Mrs. Luo want custody of [A.M.H.] reinstated in order to become citizens and stay in the United States. Mr. Baker stated that Mr. He would do anything to remain in this country.

This CASA is concerned about the possibility that Mr. He and Mrs. Luo might send [A.M.H.] back to China if custody is reinstated. Mr. He informed Mr. Baker that they might send [A.M.H.] back to China to live with relatives if Mr. He and Mrs. Luo regain custody. The Bakers believe that this would be traumatic to the child since [A.M.H.] thinks of the Bakers as her parents.

The CASA recommended that the Bakers retain custody of A.M.H. and that the juvenile court grant the Hes supervised visitation with A.M.H. twice a week for four hours each day.

According to the parties, the juvenile court referee primarily spoke to Father during the hearing about the Hes' plans for A.M.H. The referee asked Father about the Hes' finances, his pending criminal matter, and their plans for A.M.H. if they regained custody. Father told the referee that they were presently financially able to care for A.M.H., and, if they were awarded custody, they planned to send A.M.H. to China and send $25 to $35 a month to support her. At the conclusion of the hearing, the referee entered "Findings and Recommendations of Referee" denying the Hes' petition to modify the previous June 4,1999 custody order, and the juvenile court confirmed those findings that same day. The Hes did not appeal this ruling, and they continued to visit A.M.H. at the Bakers' home once a week occasionally bringing food and other items for A.M.H.

Shortly after the hearing, Father went to Macon, Georgia to work for approximately two months, and Mother remained in Memphis. During this period of time, Mother continued to visit A.M.H. at the Bakers' home. Of particular significance is a visit Mother made to the Bakers' home on August 1, 2000 to visit A.M.H. The Bakers had previously spoken to Mother and asked her to come at 10:00 a.m. because Mrs. Baker had to leave at 11:00 to meet Mr. Baker for lunch. Mother arrived at 10:45 a.m, and at 12:15 p.m.

Mrs. Baker informed Mother she needed to leave to meet Mr. Baker. Mother picked A.M.H. up and refused to leave, stating that Mrs. Baker should call the police. Mother began yelling and screaming at Mrs. Baker, referring to the Bakers as "bad people, demons." Mrs. Baker called Mr. Baker and informed him of the situation, and she asked him to return home. Mr. Baker called Father in Macon, Georgia and informed him of the situation, and Father advised Mr. Baker to call the police. According to the Bakers, Father apologized for Mother's behavior. After the police arrived, Mother agreed to leave. The Bakers informed Father that Mother would not be allowed back in their home unless he accompanied her. As a result of the incident, Father quit his job in Macon, Georgia and returned to Memphis.

The Hes continued to visit A.M.H. approximately once each week in September and October of 2000. On October 23, 2000, the Hes visited A.M.H. and brought her pears, chips, watermelon seeds, and some Chinese books. According to Mrs. Baker's journal, the Hes spoke Chinese the whole time, and they were "determined to get [A.M.H.] to call them Mama & Papa." On October 28, 2000, Mother gave birth to a son, Andy. One of Andy's ears was only partially developed at birth. After Mother gave birth to Andy, Father called Mrs. Baker to ask if she would pick up Mother and Andy from the hospital, which Mrs. Baker agreed to do. At Father's request, Mrs. Baker also delivered a document for the Hes to a social services office. Mrs. Baker visited the Hes'

home throughout the month of November 2000 to bring them food, items for Andy, and helped teach Mother how to care for the newborn. She also took Mother shopping for Andy, and she drove Mother to see Andy's pediatrician. The Hes also called Mrs. Baker occasionally to inquire about how to care for the baby. Toward the end of November, the Bakers helped the Hes when their automobile needed repairs, and they drove Mother on her errands. According to the Hes, their financial situation began to improve after Andy was born, and they were able to hire a full-time Chinese babysitter to care for Andy.

On December 4,2000, Mrs. Baker drove Father to work, and she took Mother and Andy to see Andy's ear specialist. On December 15, 2000, Mrs. Baker took Mother and Andy to another doctor's appointment, and she took Andy to have his passport photo made. Mrs. Baker subsequently took Andy to a doctor's appointment without Mother at the request of the Hes. On December 22, 2000, the Bakers invited the Hes to their home for Christmas, and the Hes visited A.M.H. the following day. The Hes did not bring A.M.H. any gifts, stating they did not have time to shop. The Bakers gave the Hes a vacuum cleaner and gave Andy clothes.

In January of 2001, the Hes visited A.M.H. at the Bakers' home four times. On January 1, 2001, friends of the Hes drove them and Andy to visit A.M.H. Shortly after arriving, Father said he had to leave, and he asked the Bakers to drive Mother and Andy back home, which they agreed to

do. On January 13,2001, the Hes visited A.M.H. and brought her three pears and some Chinese jell-0. On January 20, 2001, Father called the Bakers and wanted to come visit, but the Bakers informed him that it was an inconvenient time because Mrs. Baker was having a baby shower. They rescheduled the visit for January 22, 2001. On their way to the Bakers' home on January 22, 2001, Father called to ask if Mother could visit A.M.H. on her birthday, January 28, 2001, and the Bakers agreed. When the Hes arrived at the Bakers' home, they introduced a female accompanying them as Mother's sister. When Mrs. Baker inquired further because of her understanding that Mother only had a brother, Father stated that the female was actually Mother's cousin. Mrs. Baker noted in her journal that Mother appeared to be upset. She also noted in her journal that A.M.H. was sick, and she made an appointment for her to see the doctor.

On January 28, 2001, the Hes arrived at the Bakers' home to visit A.M.H. for what turned out to be their final visit. According to the Hes, they called the Bakers about a week prior to the visit to inform the Bakers that they wanted to take A.M.H. to have a family portrait made, and the Bakers agreed to their request. According to Mrs. Baker's journal, they had no prior knowledge of this request. When the Hes stated their intentions, the Bakers told them that A.M.H. was sick and could not leave the house. Records subsequently introduced in this matter indicate that the Bakers were in contact with A.M.H.'s doctor during this period regarding

A.M.H.'s high fever, cough, and congestion. The Hes became more insistent and demanded to take their daughter to have a family portrait made. When the Bakers refused, Father instructed them to call the police, which the Bakers did. Two sheriffs deputies arrived at the Bakers' residence and spoke to the Hes and the Bakers. Deputy John Astor ("Deputy Astor") subsequently stated that he found the Hes to be "irate," and they were outside the Bakers' home yelling and screaming. Deputy Astor spoke to Father and advised him to speak to an attorney. According to Deputy Astor, he instructed the Hes to refrain from returning to the Bakers' home that day. Mother subsequently stated that, based on Father's translation, she understood Deputy Astor's statement to mean that they could never return to the Bakers' home or they would be arrested. Mr. Baker stated that he memorialized the events of January 28, 2001 in Mrs. Baker's journal shortly after the incident because Mrs. Baker was too upset to write.

After the January 28, 2001 incident, the Hes never returned to the Bakers' home to visit A.M.H. According to Father, they did not return or call because they were afraid of being arrested, and they were also concerned about possible deportation and his pending criminal charges. Mrs. Baker stated that, after the incident, she called the Exchange Club to arrange for any future visits to be conducted there. However, the Bakers did not call and inform the Hes that future visits would be conducted through the Exchange Club. In fact, Mrs. Baker subsequently admitted that the Bakers did nothing after

the January 28, 2001 incident to promote a relationship between A.M.H. and the Hes. The Bakers did not hear from the Hes again until April 2, 2001. On that day, Mother called and left a message on the Bakers' answering machine instructing the Bakers to come to their home and "get [their] baby bed, we are moving, thank you, bye bye."[7] Mother subsequently stated that they also sent postcards to A.M.H. in April or May of 2001, but they were returned.

In February of 2001, the Hes contacted the juvenile court asking for assistance in regaining custody of A.M.H. from the Bakers. On February 15,2001, Father faxed a letter dated February 1, 2001, to the juvenile court setting forth a brief history of the case, the incident on January 28, 2001, and the Hes' desire to "take our child back and go back to China." Father also sent a copy of the letter to the media. On April 9, 2001, the Hes went to juvenile court where they met with Candice Brown ("Ms. Brown"), a probation counselor. Ms. Brown described Mother's behavior that day as "hysterical," and she appeared to be genuinely upset about regaining custody of her daughter. Ms. Brown recounted that the Hes

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[7] During a subsequent deposition, Father testified that he too called and left a message with the Bakers asking about visitation. He also stated that he mailed A.M.H. a card after January 28, 2001, but he did not receive a response. Father offered no such testimony at trial, and the trial court made no mention of this fact in its order apparently due to the trial court's findings regarding Father's credibility.

told her that they did not understand the American system, and they did not understand what they were doing when they signed the original consent order giving the Bakers custody of A.M.H. Ms. Brown explained to the Hes that, since the Bakers were not there to agree to a change of custody, they would need to file a petition and go before a judge to ask for a modification of the custody arrangement. Ms. Brown prepared a petition on April 9, 2001, wherein the Hes stated that they were presently able to care for A.M.H. Only Mother signed the petition. Ms. Brown subsequently stated that Father was present that day, but she was new to the position and only had Mother sign the petition. The Hes' petition to modify the custody arrangement was filed in the juvenile court on May 29, 2001, and the petition was set for a hearing in June of 2001. Father subsequently admitted that, as with the previous petition they filed in May of 2000, the Hes were contacted by immigration officials around the time they filed the May 2001 petition, but he could not remember the exact dates of those calls. Father stated that they received the calls from immigration officials between March and May of 2001.

At some point in May of 2001, the Hes sent their son Andy, who was seven months old at the time, to China to live with Mother's relatives. They paid their babysitter, a Chinese immigrant, to take Andy to China. According to the Hes, they sent Andy to China because they feared he could be taken from them if Father was ultimately convicted of the criminal charges pending against him. They also hoped that Mother's

father, a "traditional medicine doctor," could treat Andy's ear. While Andy was in China, the Hes sent approximately $1,000.00 each month to her family.

F. The Bakers' Petition to Terminate the Hes' Parental Rights

After the Hes filed their petition to modify the original custody order in juvenile court in May of 2001, the Bakers once again met with Mr. Weaver. Mr. Weaver recommended that the Bakers file a petition to terminate the Hes' parental rights to A.M.H. to stop the juvenile court proceedings. When the Hes appeared in juvenile court on June 6, 2001 for the hearing on their petition, the juvenile court rescheduled the hearing until June 22, 2001 because Mr. Weaver was unable to attend. Two days before the scheduled June 22, 2001 hearing, the Bakers filed a "Petition for Adoption and Termination of Parental Rights" in the Chancery Court of Shelby County. The Bakers' petition, which Mr. Weaver filed on their behalf, stated that the Hes abandoned A.M.H. by willfully failing to visit her and willfully failing to support her. The Hes were subsequently informed of the petition and the necessity to transfer the case to the chancery court. Soon thereafter, the Hes secured the services of attorney Dennis J. Sossaman ("Mr. Sossaman") to represent them in the matter. The case was initially assigned to Chancellor D.J. Alissandratos.

On June 27, 2001, the chancery court appointed Mid-South as next friend to conduct an investigation into the merits of the Bakers' adoption petition. Ms. Chunn conducted the investigation on behalf of Mid-South and opened an "adoptive family file." Ms. Chunn subsequently filed her report outlining the history between the Hes and the Bakers, and she concluded that A.M.H. "is continuing to thrive in the Baker home." On July 24, 2001, the chancery court, pursuant to the agreement of the parties, entered an order appointing attorney Kimbrough B. Mullins ("Ms. Mullins") to serve as the guardian ad litem for A.M.H. The order also provided that the parties agreed to waive any hearsay objections to any statements contained in Ms. Mullins' reports, and they stipulated that Ms. Mullins would be deemed an expert regarding any subsequent opinions she may form in the case. On September 24, 2001, the Bakers filed a notice with the chancery court that they were substituting attorney Larry E. Parrish ("Mr. Parrish") as counsel to replace Mr. Weaver.

On October 10, 2001, Ms. Mullins filed her first interim report with the chancery court. In preparing her report, Ms. Mullins conducted interviews with the Hes, assisted by Pastor Yau translating; the Bakers; Ms. Chunn; and Ms. Cloud. Ms. Mullins indicated in her report that Ms. Chunn informed her that, prior to the birth of A.M.H., Father questioned his paternity of A.M.H., and Ms. Mullins' report noted that Father confirmed this assertion. Based on her interviews with Father, Ms. Mullins noted that Father was in

favor of her suggestion that he undergo a DNA test to establish paternity. Accordingly, she included in her report a recommendation that Father undergo a DNA test to establish whether he was the biological father of A.M.H. Father subsequently denied telling Ms. Chunn he questioned paternity of A.M.H., and he denied telling Ms. Mullins he wanted a DNA test. Ms. Mullins also recommended that the parties undergo psychological testing. She recommended that the court appoint a child psychologist to evaluate A.M.H. for the psychological impact removing her from the Bakers would have and the effect of losing her cultural heritage if the Hes' parental rights were ultimately terminated. Ms. Mullins recommended Dr. David Goldstein ("Dr. Goldstein"), a licensed clinical psychologist, to perform this role. According to Ms. Mullins, the chancery court entered a consent order in October of 2001 appointing Dr. Goldstein to evaluate A.M.H.[8] Dr. Goldstein focused his evaluation on three issues: (1) the psychological status of A.M.H., (2) the effect

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[8] In a subsequent report filed in September of 2003, Ms. Mullins indicated that the chancery court did in fact appoint Dr. Goldstein to perform a psychological evaluation of A.M.H. The record does not contain an order to that effect, and we find no transcript of any hearing discussing such an order in the record on appeal. In any event, the parties do not dispute that the trial court appointed to Dr. Goldstein to conduct the evaluation.

removing A.M.H. from the Bakers would have on the child, and (3) the effect severing A.M.H.'s relationship with the Hes would have on the child.[9]

In October of 2001, Father filled out a credit application to purchase a new Mazda vehicle. In the section of the application requesting the name and address of a closest living relative, Father inserted the names "Jack Johnson" and "Jeff He"indicating they were his cousins. Father subsequently admitted that these were fictitious names he occasionally used to refer to himself. According to Father, the salesperson pressured him into buying the vehicle and encouraged him to use the fictitious names. The application reflects that the Hes made a $1,500.00 down payment on the vehicle which cost approximately $18,000.00, and they financed the rest by making payments of approximately $300.00 per month beginning in November of 2001.

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[9] Dr. Goldstein never evaluated the Hes or the Bakers in this case. When he was initially contacted by Ms. Mullins, Dr. Goldstein would not agree to conduct an evaluation of the adults because he felt that, due to the cultural issues involved and the costs associated with performing such a complex evaluation, he wanted to gather a neutral team of professionals to conduct the evaluation. According to Ms. Mullins, counsel for both parties objected to her request to evaluate the Bakers and the Hes citing the costs associated with such an evaluation, therefore, the chancellor decided to defer a decision on an evaluation of the parties.

On January 7, 2002, the Hes were legally married in Memphis, Shelby County, Tennessee. Around that time, Father took a DNA test which established that he was indeed the biological father of A.M.H. Shortly thereafter, he filed a "Voluntary Acknowledgment of Paternity." Mother became pregnant with the Hes third child around this time as well.

On January 23, 2002, the Bakers filed a motion requesting that the chancery court order the Hes to pay Ms. Mullins' fees, deposit a sum with the court sufficient to pay for future costs associated with psychological evaluations, expert testimony, and DNA testing. In support of their motion, the Bakers relied on the following testimony from Father's deposition, wherein he stated:

> Q. Is you [sic] your understanding that you have the responsibility to pay at least initially half of the cost for Ms. Mullins service as guardian ad litem?
>
> A. I do not understand it.
>
> Q. Okay. Are you prepare [sic] to pay half of her fees when they are due?
>
> A. Let me put it this way, money is nothing compared with the human being.
>
> Q. Okay.

A. Compared with having our daughter back. Money is nothing if in the money is justified, if the expense.

Q. Well, if the Court ordered you to pay stay [sic] $3,000 toward the guardian ad litem's fee, are you able and willing to make that payment?

A. I'm able, but I'm not necessarily willing.

Q. So it may be that you would have the money, but just because the Court told you to pay it, you wouldn't necessarily pay it, right?

A. I will wait and see. I cannot make decisions right now. I will wait and see.

Q. But you do reserve to yourself the right to make a judgment about whether you will or will not follow the order?

A. I will consult a few other people before I make my decision.

Q. Okay. Now, when you say that you are able, do you mean you have the money in the bank?

A. I have part of the money in the bank, but, you know, as a Chinese, Chinese

tradition is different from American tradition. I can borrow money very easily from my friends, my relatives.

Q. All right?

A. Yes.

Q. How much money do you have in the bank?

A. Right now I have $2,500 and 60-something most recent information.

Q. Now, you say you can borrow money from friends and
relatives; is that correct?

A. Yes.

Q. Okay. Give me the names of the friends for whom you would borrow money if you needed to borrow money?

A. Most of them in China. I can give it to you.

Q. Please.

A. My relatives such as my wife's brother ....

Q. Okay.

A. Her brother is a very successful young man. Younger brother.

Q. And how much capacity would he have to lend you money, if you needed money from him?

A. I think he can easily loan us one million.

Q. One million?

A. Yes. One million.

Q. Okay. All right. You are talking about dollars?

A. Yes.

Q. Okay. And who else?

A. And then that's for my wife's brother, younger brother. And then for from my relatives, my sister just now mentioned, she is an attorney. She can loan me about $10,000. U.S. Dollars.

Q. Okay. And who else?

A. And some of my previous co-workers the Chong Qing University....

Q. Okay. And he's at -

A. He is an architect.

Q. Architect?

A. Yes.

Q. And how much do you think you could borrow from him if you needed?

A. $10,000.

Q. Okay. Anybody else?

A. I think that's sufficient to see through this case.

Q. And you think you would need to do anything to borrow the money from the other than just ask them and tell them how much you need?

A. I would tell them and if- I know - I know they will. They will be very happy to do so. I know that. Because we are fighting for our daughter back.

Father also mentioned that he could secure the funds within a month and that he could receive these loans interest free. Mother subsequently testified that Mr. Sossaman, their attorney at the time of Father's deposition, instructed Father to testify at his deposition that they had more money than they actually did. However, Father subsequently testified that Mr. Sossaman did not ask him to misrepresent their income. Although he admitted to lying about their income during his deposition, Father asserted that Mr. Parrish trapped him into saying how much money they could acquire.

On February 7, 2002, the chancellor conducted a hearing on the Bakers' motion. At the hearing, Ms. Mullins requested that the chancery court take custody of A.M.H.'s passport. The Hes informed the chancellor that the passport was at their apartment, and the chancellor ordered the Hes to

surrender the passport to the court by 4:00 p.m. that day. The chancellor also appointed an attorney ad litem to represent Ms. Mullins.[10] Regarding the Bakers' motion, the chancellor ordered the Hes to deposit $10,000 with the chancery court to cover future guardian ad litem fees, to pay for the DNA test, and to deposit $5,000 to cover the projected costs associated with psychologically evaluating the parties and A.M.H.

The Hes did not comply with the chancellor's ruling by tendering A.M.H.'s passport to the court on February 7, 2002. When subsequently questioned about his communication with a reporter after the hearing, Father provided the following testimony:

> Q. And do you recall [the reporter] asking you whether you were going to produce the passport or not produce the passport?
>
> A. About the passport, I think I told her that we did not want to give the passport. That's what I said.

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[10] On February 12, 2002, the chancellor entered an order *nuncpro tune* to February 7, 2002 addressing the oral orders entered at the February 7 ,2002, hearing. The court entered an order on April 2, 2004, *nuncpro tune* to February 2, 2002, appointing attorney Linda L. Holmes as the attorney ad litem for Ms. Mullins.

Q. Okay, are you denying that you said to her, "Which would make a better story for you"?

A. I could not remember exactly what I said, but the point is that I did not want to give the passport. That's my point.

Q. Did you say to her words that, "I may do either one. Which one will make the best story for you?"

Q. Are you denying that you said that?

A. I do not deny it. I could not remember that. That's what I said.

Father went on to testify that there was a sixty percent chance he made the statement versus a forty percent chance that he did not make the statement. According to Father, he "was trying to get the media's attention in order to help me to get my daughter back." On February 8, 2002, the chancellor entered an "Order to Show Cause" reflecting that the court received a call from the guardian ad litem, counsel for the Hes, and counsel for the Bakers on February 7, 2002, at approximately 4:00 p.m. informing the court that the Hes did not intend to comply with the chancellor's order.

The chancellor entered another order on February 8, 2002, appointing the Bakers guardians of A.M.H., and the chancellor ordered that the Hes have no contact with A.M.H.

until the court entered an order directing otherwise. The order indicated that the chancellor based his decision on the entire record, including the recommendation of the guardian ad litem. The Certificate of Service on the order indicated that it was presented to Mr. Sossaman, counsel for the Hes, and Ms. Mullins, the guardian ad litem for review. However, Mr. Parrish, counsel for the Bakers, was the only attorney who signed the order indicating his approval. The Bakers never requested such an order, and the record on appeal contains no transcript of any hearing addressing the need for such an order. In fact, Mr. Parrish subsequently testified at trial that, as everyone was preparing to leave the hearing on February 7, 2002, the chancellor instructed him to draft the order. According to Mr. Parrish, the chancellor instructed him to forgo having the other attorneys sign the order. Mr. Parrish stated that Mr. Sossaman was no longer the Hes' attorney at the time, and he admitted that he did not show the order to Mr. Sossaman prior to presenting it to the chancellor for his approval. Mr. Parrish was the only lawyer present in the courtroom when the chancellor read the order and signed it.

It was not until February 14, 2002 that Mr. Sossaman filed his "Motion to Withdraw" with the chancery court citing a conflict of interest. That same day, the chancellor conducted a hearing on the previous "Show Cause Order" and Mr. Sossaman's "Motion to Withdraw" as counsel for the Hes. Mr. Sossaman informed the court that a conflict had developed between the Hes regarding the manner in which the

case should proceed after the February 7, 2002 hearing. The chancellor required Mr. Sossaman to remain as counsel for Father during the hearing, and Mother chose to represent herself. During the hearing, Mother informed the chancellor that she would not comply with the court's previous order to surrender the passport. Father testified that, after the previous hearing, he tried to get the passport from Mother, who had control of the document, but she refused to tell him where she put it. At the conclusion of the hearing, the chancellor determined that Father was not a credible witness, that both Mother and Father had control of the passport, and that Father was "a willful, knowing, perjurer on these points." The chancellor ordered the Hes to surrender the passport by 9:00 a.m. the following morning or face incarceration.[11] That same day, the chancery court entered an order permitting Mr.

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[11] The chancellor had previously instructed the Hes to produce proof of their marriage in China and proof of their Tennessee marriage. At the hearing on February 14, 2002, the chancellor found that the Hes never married in China. On February 15, 2002, the chancellor ordered the Hes to produce a copy of their Tennessee marriage license. This order was the subject of a separate contempt proceeding.

The court also entered a subsequent show cause order requiring the Hes to appear and explain why they failed to pay the $ 15,000.00 the court previously ordered them to pay. The Hes subsequently complied with the court's order and entered a notice of their payment of $15,000.00 to the court.

Sossaman to withdraw from representing the Hes in this matter. On February 15, 2002, attorney David A. Siegel ("Mr. Siegel") filed a notice with the chancery court indicating that he would be taking over representation of the Hes in the matter.

On February 20, 2002, the Hes filed a motion requesting that the chancellor order immediate visitation with A.M.H. and vacate its previous order directing them to refrain from contacting their daughter. On February 22, 2002, the chancellor entered an order nuncpro tune to February 14, 2002, finding the Hes in civil contempt for refusing to surrender A.M.H.'s passport, and the court ordered them incarcerated until such time as they purged themselves of the contempt by producing the passport. The Hes subsequently complied by delivering the passport to the court.

On March 7, 2002, the chancellor conducted a hearing on the Hes' petition requesting visitation. Regarding the chancellor's prior order directing no contact between the Hes and A.M.H., the following exchange occurred:

THE COURT: Why did I issue a no contact order?
MR. PARRISH: The guardian ad litem asked you to.
THE COURT: The Hes were here with counsel at the time and didn't object. Let me say this, I need to have an evidentiary hearing so I can see whether or not I need to reverse myself, stick with what I have

done, whatever it is, because I don't remember why I did it. It sounds more logical, which is - because it's not like me to sit and go, I'm looking at an overcast day, I think I will deny, think I will deny you visitation. I usually do things for a reason. People might disagree, but I am a person who reasons through things.

MR. SIEGEL: I realize that.

THE COURT: — Obviously what happened was the guardian ad litem made a recommendation the other side remained silent on and didn't offer proof, and I went on ahead, and I went on, said my job is to be decisive, not just ride the fence being indecisive.

So, I made a decision, one side said, I would like for you to decide this way, which is to deny visitation, and the other side was heard for whatever short time it was or long time it was or whatever, then I made a decision. Now, having done that, I'm more than happy to revisit it, but if I'm going to revisit it now, I'm going to need to

> hear from the guardian ad litem, and witnesses, anybody they want to call, because the law is not absolute on this.

As previously mentioned, the record on appeal does not contain any motion by the Bakers or Ms. Mullins asking for a ruling on visitation or a no contact order, and the record does not contain a transcript of any evidentiary hearing addressing the entry of the order. According to Mr. Parrish's subsequent testimony at trial, no prior hearing was ever conducted on this issue. In fact, Ms. Mullins' interim report filed on October 10, 2001 only contained a recommendation that any visitation between the Hes and A.M.H. be supervised. Ms. Mullins subsequently stated that there was no pending motion on this issue, but she believed the chancery court had enough evidence before it to justify the order. In any event, the trial court declined to consider the Hes' motion on the day of the hearing.

On March 8,2002, the Bakers filed a motion to amend their petition to allege that Father was not the legal parent of A.M.H. but only her biological father with no basis to allege he had parental rights to A.M.H. The chancery court subsequently granted the Bakers' motion to amend their petition. Thereafter, the parties filed numerous motions with the trial court. On April 22,2002, the Bakers filed a motion for default judgment. On April 25,2002, the Hes filed a motion for summary judgment arguing that the record, as a

matter of law, failed to establish that the Hes abandoned A.M.H. On May 1, 2002, the Bakers filed a motion for partial summary judgment alleging Father had no parental rights to A.M.H., but they subsequently withdrew the motion.

In July of 2002, Dr. Goldstein filed his report with the chancery court. Dr. Goldstein concluded that A.M.H. was thriving with the Bakers, and she viewed the Bakers as her "psychological parents." After acknowledging that he could not predict how a specific individual would respond to an interruption in attachment, he concluded that, based on his research, a child who experiences loss in early childhood is at a greater risk of developing serious psychological disorders in the future. He opined that, if A.M.H. were removed from the Bakers, she would experience separation anxiety and possibly develop a depressive disorder. While he found the research involving transcultural adoptions to be sparse, he concluded that such adoptions do not appear to have any significant differences from normal adoptions. Dr. Goldstein subsequently admitted that, as of the date he filed his report, he had not investigated the attachment between A.M.H. and the Hes. However, he opined that A.M.H. would have very little attachment to the Hes based on his observation of her interactions with the Bakers and the fact that the Hes had only visited her approximately eighty times for one hour each time. On August 30, 2002, the chancellor entered a consent order releasing Dr. Goldstein's preliminary report to the attorneys, and the court limited their disclosure of the report to the

attorneys, the parties, any other experts to be utilized by the parties. On September 9, 2002, Mother gave birth to the Hes third child, Avita. On November 8, 2002, the Hes filed a notice with the Tennessee Attorney General of their intent to challenge the constitutionality of certain Tennessee statutes, specifically certain provisions contained in section 36-1 -102 and section 36-1-113 of the Tennessee Code. Thereafter, Assistant Attorney General Douglas E. Dimond ("Mr. Dimond") entered an appearance in the chancery court to defend the constitutionality of the statutes. On June 23,2003, the Hes filed a motion requesting a jury trial, and a motion to bifurcate the proceedings into a separate determination of the grounds justifying termination and a decision on the best interest analysis.

On September 4, 2003, the chancery court conducted a hearing on the Hes' motion contesting the constitutionality of certain Tennessee statutes. On September 10, 2003, attorney Richard A. Gordon ("Mr. Gordon") entered a notice of appearance as co-counsel for the Hes. That same day, the Hes filed a motion asking the chancellor to set aside its prior order appointing Mid-South and Ms. Chunn as next friend to investigate the Bakers' adoption petition. On September 12,2003, the Bakers filed a motion in limine requesting a ruling that any parental rights Father may have as to A.M.H. are subject to termination pursuant to section 36-1-113(g)(9) of the Tennessee Code. The Bakers also filed a motion asking the chancery court to consolidate the Bakers' petition to

terminate the Hes' parental rights with Mother's petition filed in the juvenile court on May 29, 2001, asking the juvenile court to modify the June 4,1999 custody order. That same day, the Hes filed a motion, pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure, asking the chancery court to set aside the consent order issued in juvenile court on June 4, 1999. On September 15, 2003, the Hes filed a motion for default judgment against the Bakers on Mother's May 19, 2001 petition filed in juvenile court requesting a modification of the custody order.

On September 23, 2003, Dr. Goldstein conducted a videotaped "attachment session" with A.M.H., the Hes, and the Bakers. The video recording of the incident is included in the record on appeal. Dr. Goldstein met with the parties prior to the meeting to explain the purpose of the meeting and the parameters of permissible conduct at the meeting, which included keeping the contents of the meeting confidential. According to Dr. Goldstein, the video demonstrated the high level of attachment A.M.H. has to the Bakers. The Hes brought food items and gifts to the meeting which, according to Dr. Goldstein, they used to encourage A.M.H. to interact with them. Dr. Goldstein did not attribute A.M.H.'s willingness to approach the Hes to retrieve an item to mean she still had a level of attachment to the Hes. Dr. Goldstein stated that, the day after the session, he observed a news interview with the Hes wherein the Hes stated that A.M.H. thought they abandoned her.

On September 24, 2003, Ms. Mullins filed another report wherein she opined that the Hes abandoned A.M.H. by failing to visit and failing to support her. Ms. Mullins cited A.M.H.'s level of attachment to the Bakers and concluded that she should remain in the Bakers' custody. On September 25, 2003, the Hes filed an amended motion to set aside the consent order awarding custody of A.M.H. to the Bakers entered in June of 1999. That same day, the Hes filed a motion asking the chancery court to set aside its previous order appointing the Bakers the guardians of A.M.H. On September 26, 2003, the chancery court entered an order denying the Hes' motion challenging the constitutionality of certain provisions in section 36-1-102 and section 36-1-113 of the Tennessee Code. On September 29,2003, the Hes filed a motion requesting immediate visitation with A.M.H.

On October 2,2003, the Hes filed a motion pursuant to section 36-1-119(d) of the Tennessee Code requesting that the trial court dismiss the Bakers' petition for adoption because the adoption proceeding had been pending beyond the statutorily allowed period. On October 23, 2003, Ms. Mullins filed an addendum to her previous report filed on September 24, 2003.

On November 5,2003, the Bakers filed a motion in limine requesting that the chancery court issue a ruling on the meaning of the word "willfully" as used in section 36-1-102(1)(A)(i) of the Tennessee Code. On November 6, 2003, Chancellor Alissandratos received a letter from attorney

Chad A. Massey notifying him that the Hes filed a complaint with the Tennessee Court of the Judiciary alleging judicial misconduct. On November 7,2003, the Hes filed a renewed motion for emergency visitation with the trial court. On November 14,2003, Mr. Gordon filed a notice with the chancery court of his intention to withdraw from representing Father and solely represent Mother. That same day, Mr. Siegel notified the chancery court of his intention to withdraw from representing Mother and solely represent Father. Also on November 14, 2003, Chancellor Alissandratos convened a hearing wherein he informed the parties that, due to an ethical complaint filed by the Hes and "to avoid even the appearance of impropriety," he would recuse himself from the case. Shortly thereafter, the Chief Justice of the Tennessee Supreme Court entered an order assigning Robert L. Childers of the Shelby County Circuit Court to hear the case by interchange.

On December 1, 2003, the Hes' second child, Andy, returned to the United States. After picking up Andy at the airport, the Hes proceeded to Wal-Mart where they encountered Hope Baker, the Bakers' older daughter, A.M.H., Aimee, and another child Mrs. Baker was babysitting. Mrs. Baker was in another part of the store shopping, and Hope was watching over the other children. Upon seeing A.M.H., Mother approached A.M.H., touched the child, and said loudly, "That's my daughter. Give me my daughter." Hope grabbed A.M.H. and began screaming for help. A Wal-Mart manager heard the scream for help and approached the group.

Father subsequently approached the group and told another manager who arrived at the scene that the Hes wanted to take A.M.H. and leave. One of the Wal-Mart managers called the police to deal with the situation.

On January 22, 2004, Judge Childers convened a hearing to ascertain the status of the case and any pending motions, and he inquired about moving the case to trial as soon as possible. At a hearing on January 27, 2004, the Hes made an oral motion requesting a visit with A.M.H. the following day, her birthday. At the conclusion of the hearing, the trial court orally ordered that the Hes were to have no contact with A.M.H. until after a trial in the matter. On January 28,2004, the trial court entered separate orders, all nuncpro tune to September 4,2003, denying the Hes' motion for summary judgment, denying their motion to bifurcate the proceedings, and denying their motion for a jury trial.

On February 6,2004, the trial court entered an order addressing the Hes' previous request for visitation on A.M.H.'s birthday and denied any future contact between the Hes and A.M.H. until the completion of the trial in this matter, effectively denying the Hes' previous motions requesting visitation. On February 23, 2004, the trial court entered a "Joint Pretrial Order" setting forth the disputed and undisputed facts in the case. On February 27,2004, the trial court, recognizing that no order had been entered allowing Mr. Weaver to withdraw as counsel for the Bakers, entered an

order nuncpro tune to September 30, 2001 permitting Mr. Weaver to withdraw from the case.

G. The Trial

The trial on the Bakers' petition for adoption and termination of the Hes' parental rights to A.M.H. and the Hes' petition to modify the June 4, 1999 custody order got underway on February 23, 2004 and continued until March 2, 2004. During that time, the trial court frequently held court well into the night and heard testimony from twenty-eight (28) witnesses and admitted seventy-nine (79) trial exhibits into evidence.

In addition to the aforementioned facts, the Hes testified that they never intended to place A.M.H. for adoption or permanently relinquish custody of A.M.H. to the Bakers. The Hes took the position that the Bakers intended to adopt A.M.H. from the very beginning of the parties' relationship. Father testified that Chancellor Alissandratos, Ms. Mullins, Dr. Goldstein, and Mr. Parrish engaged in a conspiracy against the Hes.

The Hes presented their own experts at trial to refute the testimony of Dr. Goldstein. Dr. John F. Cooper ("Dr. Cooper"), a professor of international studies at Rhodes College, testified regarding the manner in which Chinese citizens view children and the family. He testified that the extended family plays a pivotal role in Chinese culture, and it is not uncommon for students to ask family members to care

for their children while they pursue a higher education. According to Dr. Cooper, the child is returned to the biological parents at their request. He testified that China does not have a legal concept comparable to the Tennessee statutes governing termination of parental rights. Dr. Cooper acknowledged his familiarity with the "one-child" rule in China, and noted that the Chinese government will typically require the mother to get an abortion upon becoming pregnant a second time. He also stated that the Chinese government may impose fines on the biological parents who have extra children, but these fines are only imposed on children born in China. Under cross-examination, Dr. Cooper admitted that it is possible that fines could be imposed on a parent who had children in another country and returned to China with more than one child, but he stated that doing so is not the general policy. Counsel for the Bakers also questioned Dr. Cooper on cross-examination concerning an opinion issued by a federal bankruptcy court finding him to be an untruthful witness and imposing sanctions against him and the attorney representing him in the matter.

Dr. John Hutson ("Dr. Hutson"), a psychologist, reviewed Dr. Goldstein's report and records, and he testified that Dr. Goldstein did not perform his duties appropriately in this matter. Upon reviewing the video of the "attachment session" conducted by Dr. Goldstein on September 23, 2003, Dr. Hutson concluded that the video revealed that Mrs. Baker was "controlling" A.M.H. and "holding onto her." According

to Dr. Hutson, there was "a great deal of comfort" between A.M.H. and the Hes. However, Dr. Hutson subsequently admitted that, after reviewing the video in court once more, he did not see Mrs. Baker "clasping" the child during the meeting. He also admitted that he could not form an opinion as to A.M.H.'s attachment to either the Hes or the Bakers based on the video.

Dr. John V. Ciocca ("Dr. Ciocca"), another psychologist, reviewed the video of the "attachment session" and concluded that A.M.H. responded "very favorably" to the Hes, and the "connection between the biological parents and this child had survived." He opined that A.M.H. had a positive reaction to the Hes which signified that a prior connection survived despite their prolonged absence from her life. Dr. Yih-Jia Chang ("Dr. Chang"), a clinical psychologist practicing in California, performed psychological evaluations on the Hes in September of 2003. According to her test results, the Hes did not present any abnormal psychological traits. Regarding the testing procedures used to evaluate the Hes, Dr. Chang stated that the Hes were rotated during the test to conduct personal interviews. While admitting that this is not the best way to administer the tests, Dr. Chang stated that it was the best method given the circumstances.

Dr. Goldstein testified that Father filed a complaint with the ethics committee during the pendency of these proceedings to complain of the manner in which he fulfilled his duties to the court. Prior to giving his testimony in the

case, Dr. Goldstein stated that Father approached him in the hallway of the courthouse and informed him that he did not intend to pursue the complaint. In response to the Hes' experts, Dr. Goldstein testified that what Dr. Hutson characterized as "controlling behavior" he viewed as "healthy attachment behavior" between a mother and her child. His view of the "attachment session" was that the Hes used food and gifts to encourage A.M.H. to interact with them, but he did not view A.M.H.'s willingness to approach them as evidence of an attachment to the Hes. He noted that, during the session, the Bakers encouraged A.M.H. to interact with the Hes, but he opined that A.M.H. did not have the attachment to the Hes that she did to the Bakers. According to Ms. Mullins, A.M.H. viewed the Hes as "special friends."

In March of 2004, after the evidence had been presented to the trial court, the parties began to file various motions asking the court to exclude or strike the testimony of various experts and witnesses. On March 22, 2004, Ms. Mullins filed a motion asking the trial court to allow her to reopen the proof and present evidence regarding the issuance of the guardianship and no-contact order. In her affidavit attached to the motion, Ms. Mullins stated that, after reviewing Mr. Parrish's testimony at trial regarding the issuance of the no-contact order and his notes from the event, she determined that Mr. Parrish's recollection of the events as testified to at trial was incorrect. According to Ms. Mullins, when she learned from the Hes' attorney at the time that they

were not going to deliver A.M.H.'s passport to the court as ordered, she asked Chancellor Alissandratos to issue the order to protect the child from being removed to China during the pendency of the proceedings. Mr. Parrish subsequently filed a response to Ms. Mullins' motion stating that his recollection of the events surrounding the issuance of the order now conformed to that of Ms. Mullins.

On March 29, 2004, the trial court entered an order granting the Bakers' motion to consolidate their petition to terminate the parental rights of the Hes with Mother's petition to modify the June 4, 1999 custody order entered by the juvenile court. That same day, the trial court entered a consent order admitting Ms. Mullins' affidavit and Mr. Parrish's notes from the conference call with Chancellor Alissandratos into evidence.

On April 5, 2004, Mr. Dimond filed, on behalf of the Attorney General, a motion to intervene in the proceedings to defend the constitutionality of any statutes which may be placed at issue. On April 6, 2004, the trial court entered several orders addressing the parties' pending motions: the court denied the parties' motions to exclude certain testimony from the record; the trial court entered an order denying the Hes' motion filed on September 10, 2003, to set aside the order appointing Mid-South next friend to conduct an investigation into the adoption petition; the trial court entered an order denying the Hes' motion for default judgment on their petition to modify the June 4, 1999 order entered by the

juvenile court; the trial court denied the Hes' motion to set aside the June 4, 1999 consent order; the trial court denied the Hes' motion to set aside the order appointing the Bakers guardians of A.M.H.; and the trial court denied the Hes' motion to dismiss the Bakers' adoption petition filed on October 2, 2003. These orders effectively dealt with all of the pending motions filed by the parties in this case.

H. The Trial Court's Judgment

On May 12, 2004, the trial court entered its seventy-two (72) page memorandum opinion granting the Bakers' petition to terminate the Hes' parental rights to A.M.H. and denying Mother's petition to modify the custody order entered on June 4, 1999 by the juvenile court, stating:

> Specifically, this Court finds that (1) the Hes willfully abandoned AMH for a period exceeding four (4) months, (2) the Hes provided no support for a period exceeding four (4) months, (3) the Hes only sought custody of AMH to prevent the Hes' deportation, and (4) it would be in AMH's best interest to terminate the Hes' parental rights and to remain with the Bakers. The Court will hold the Bakers' Petition For Adoption in abeyance until the Court's decision on the Petition to Terminate Parental Rights and the Petition to Modify Custody is final.

Throughout the order, the trial court set forth its extensive findings of fact, conclusions of law, and credibility determinations.

Regarding the credibility of the Bakers and the Hes, the trial court's order provides, in relevant part, as follows:

> **I. GENERALLY SIGNIFICANT FACTS**
>
> 20. Mr. He questioned whether he was the biological father of AMH and requested that the guardian ad litem arrange blood testing for Mr. He, Mrs. He, and AMH to determine paternity of AMH.
>
> 21. Mr. He filed an acknowledgment of paternity on March 15, 2002.
>
> 29. All parties, including Mr. and Mrs. He, knowingly and voluntarily signed the June 4, 1999, Consent Order Awarding Custody, without being induced by any fraud or undue influence.
>
> **II. LITIGANT CREDIBILITY**
>
> The Court has carefully scrutinized the testimony of the Hes and the Bakers. Because they have an interest in the outcome of the case, the reliability of their testimony has been viewed in relation to other evidence and the entire record in

this cause, for corroboration and/or inconsistency and the Court has weighed their testimony accordingly.

The Court observed Mr. Baker testify for approximately three (3) hours of live testimony at trial. Mrs. Baker testified for approximately five (5) hours of live testimony at trial. Mrs. He testified for approximately ten (10) hours of live testimony at trial. Mr. He testified for approximately seven (7) hours of live testimony at trial. The Court also observed Mr. He testify for approximately six (6) hours, by a video-tape deposition that was admitted as Trial Exhibit 20.

The Court was physically present with the Bakers and the Hes in the courtroom for over ninety-one (91) hours of trial testimony, over fifteen (15) hours of arguments on motions after the conclusion of proof, and six (6) hours of closing arguments. The Court observed each of them throughout the trial proceedings and interacted, through counsel, with them as the trial proceeded to conclusion. The Court makes the following findings of fact regarding credibility of the witnesses:

32. Mr. Baker impressed the Court as a man who has a great deal of love, care, and concern for children in general, but who has an enormous amount of love, care, and concern for his own natural born children and for AMH. He testified in an honest, straightforward, sincere

manner. Mr. Baker impressed the Court with his sincerity and the concern he expressed for AMH's welfare and safety. Mr. Baker has demonstrated concern for and a willingness to help others who are in need, including the Hes. As one example, Mr. Baker helped Mr. He when Mr. He's vehicle was in the shop for repairs.

33. Mrs. Baker impressed the Court as a sincere, honest, credible witness. She too has demonstrated that she has a great deal of love, care, and concern for children in general, but she also has an enormous amount of love, care, and concern for her own natural born children and for AMH. Mrs. Baker also impressed the Court with her care and concern for AMH's welfare and safety. Mrs. Baker has demonstrated concern for and a willingness to help others who are in need, including the Hes. For example, she took Mrs. He to obtain social services and to apply for TennCare insurance coverage for the Hes' second child, Andy, who was born in October 2000. She took Mrs. He and Andy home from the hospital after Andy's birth. She loaned the Hes a baby bed for Andy. She went to the Hes' apartment to show Mrs. He how to feed,

burp, bathe, and change Andy's diapers. She took Andy to the doctor's office because Mr. He was too busy, and she took Andy to other appointments because Mr. He was too busy.

34. Both of the Bakers demonstrated their concern and care, and lack of any animosity toward the Hes, by foregoing their church and other regular activities to accommodate the Hes' visits with AMH. The Bakers also served the Hes dinner on several of their visits, and allowed the Hes to bring friends with them to the Bakers' home for visits, serving the friends dinner as well....

35. Mr. He is highly educated, both in the Peoples Republic of China and in the United States, and exhibits a high level of intelligence. He has demonstrated that he also has a high level of knowledge of the culture in the United States, that he is familiar with the justice system in Shelby County, Tennessee, and that he is proficient in his knowledge and use of the English language.... He has an aggressive personality and shows no propensity to be deterred or intimidated. He is a thoughtful and deliberate person who exhibits a proclivity to calculate, plan, and carefully predetermine his action and behaviors. At all times relevant to

this case, Mr. He has demonstrated the ability to access knowledgeable advisors in any area in which he needs assistance, to scrutinize the advice given, and, if dissatisfied with the advice, reject the advice and seek out other advisors.

36. Since 1998, Mr. He has repeatedly engaged in a pattern of conduct marked by deceitfulness and dishonesty, without remorse, repentance, or conscience, and has shown a propensity to justify all means, including perjury, for what Mr. He deems to be justifiable ends.

37. Mr. He admitted that he lied about his income, under oath, in his December 21,2001, deposition and that he said things he knew were not the truth.... The Court has previously found that Mr. He committed perjury while under oath in Court hearings and pleadings filed in this cause.

38. The Court reaffirms and incorporates herein by reference the findings made by the Court relative to the perjury of Mr. He in testimony given before the Court on February 14,2002, as memorialized in the February 22, 2002, order entitled "Judgment On Order To Show Cause Pertaining To Passport" and the order entitled "Judgment On Order To Show Cause

Pertaining To Documentation Of Marriage In The Republic Of China."

40. Mr. He made material false statements on a loan application, dated October 18, 2001, relative to his employment, his income, his status as a student, and his personal references for the purpose of securing a loan for the purchase of a new vehicle.

42. Mrs. He is an impetuous person not subject to being intimidated or deterred in achieving whatever she sets as her goal. The evidence shows that she is calculating, almost theatrical, in her actions. The evidence further shows that she is dishonest and manipulative, and has a history of acting in an unstable manner when it serves her own self-interest. For example, during cross-examination, Mrs. He would begin sobbing when asked difficult questions. However, Mrs. He would immediately regain her composure when asked subsequent questions. It appears to the Court that Mrs. He's courtroom hysterics were calculated by Mrs. He in an effort to avoid answering the difficult cross-examination questions.

43. Though Mrs. He speaks sufficient English to carry on her daily affairs in the United States, she is not as proficient as Mr. He in knowledge or use of the English language and, unlike Mr. He, sometimes needs assistance with translation in technical and extraordinary use of the English language. She has confidence in Mr. He, prefers Mr. He as her translator, has no desire to part company with Mr. He for any reason and intends to cooperate folly with Mr. He to remain together with him as a family and believes Mr. He has never failed to keep her folly and honestly informed about the legal matters involving AMH.

44. Although Mrs. He does not speak the English language fluently, she appears to speak and understand English better than she professes. For example, Mrs. He spoke English during some of the Hes' visits with AMH at the Bakers' home and when Mrs. He took the Hes' other children for medical treatment _____ During the trial, in response to a question from attorney Linda Holmes, Mrs. He responded to the question by speaking English, before the interpreter had begun interpreting Ms. Holmes' question to

Mrs. He. Mrs. He said, "Mr. Parrish filed legal motion," then she stopped speaking English and began responding to the question in Chinese.

48. Mrs. He only seems to be interested in regaining custody of AMH when deportation seems imminent. This fact is evidenced by Mrs. He filing the two (2) petitions to modify custody in close proximity to receiving calls from the United States Immigration & Naturalization Service ("INS"), regarding Mr. and Mrs. Hes' immigration status.

49. From the totality of the credible proof at trial, both Mr. and Mrs. He have shown themselves to be persons who do not consider themselves to be bound by the rule of law. Mr. and Mrs. He have demonstrated that they will do and say anything in order to achieve their desired goals.

The trial court also made credibility determinations regarding the other witnesses at trial. As for the expert witnesses, the trial court determined that Dr. Cooper's testimony was "totally lacking in credibility," citing the court's agreement with the bankruptcy court's findings regarding his credibility in that matter. Moreover, the trial

court concluded that "Dr. Cooper is not an expert in Chinese adoption law, nor is he an expert on termination of parental rights." The trial court determined that the underlying facts or data relied upon by Dr. Chang in forming her opinions were untrustworthy as to Mother, and the court gave no weight to her findings as to Father because of her reliance on his answers to her questions. As for Dr. Hutson, the trial court found his testimony to be of little assistance because he did not personally evaluate A.M.H., and he only viewed the videotape of the "assessment session" in reaching his opinions. The court found Dr. Ciocca's testimony to be of little value given his testimony that he could not offer an opinion as to A.M.H.'s level of attachment to the Bakers or the Hes after viewing the videotape. Finally, the trial court determined that Dr. Goldstein was "a very knowledgeable, honest and forthright witness." Regarding the other witnesses at trial, the trial court determined each to be a credible witness. Specifically, the trial court found Mr. Weaver, Ms. Mullins, Ms. Chunn, Ms. Cloud, and Pastor Yau to be credible witnesses.

In light of these credibility determinations, the trial court addressed the merits of the parties' petitions. Beginning with the due process claims, the trial court made the following relevant findings:

> 63. Both before and after June 4, 1999, the Hes engaged the services of at least two attorneys in Memphis ... to advise and represent the Hes

in civil litigation arising from physical injuries Mrs. He allegedly sustained in November of 1998. The Hes also spoke to another attorney that Ms. Chunn referred them to ... about civil litigation. Neither of the Hes ever mentioned to any of these three attorneys the need for representation or advice regarding placing or retaining custody of AMH.

64. Both before and after June 4, 1999, Mr. He engaged the services of at least three attorneys to advise him and represent him in defense of the criminal charges brought by the State. . . Neither of the Hes ever mentioned to any of these attorneys the need for representation or advice relative to AMH's custody. In fact, the Hes never told these three attorneys about the existence of AMH.

67. On June 2,1999, attorney Kevin Weaver met with Mr. He and the Bakers and fully advised Mr. He and the Bakers of the legal ramifications of filing a petition for custody and of signing a consent order awarding custody of AMH. Mrs. He, after being fully advised of the meeting and of the purpose of the meeting by Mr. He, waived her right to be present at the meeting and told Mr. He to tell

the others at the meeting that she was ready to proceed. Mr. Weaver answered all of Mr. He's and the Bakers' questions during the meeting. Mr. He later advised Mrs. He of the information that Mr. Weaver imparted at the meeting.

68. On June 3, 1999, Ms. Chunn and Mr. Kenny Yao, an experienced interpreter in English and Mandarin Chinese, met with Mrs. He, alone, in the Hes' apartment . . . . Mrs. He indicated that she understood everything that Ms. Chunn had told her through Mr. Yao.

69. On June 4, 1999, Ms. Sarah Cloud, with the assistance of a qualified interpreter, privately met with Mrs. He, without Mr. He, and fully explained the legal ramifications of both the Petition for Custody and the Consent Order Awarding Custody, both of which Mrs. He later voluntarily signed.

70. . . . . Although the Hes had consulted with attorneys in the past regarding other legal matters, the Hes never inquired at Juvenile Court about getting an attorney to provide the Hes legal advice concerning the original transfer of custody of AMH.

71. A few months after the Hes signed the June 4,1999, Consent Order Awarding Custody, the

> Hes went to Juvenile Court and spoke with Ms. Cloud about getting assistance to file a petition to regain custody of AMH .... Ms. Cloud advised the Hes that they should hire an attorney for legal advice and representation, and Ms. Cloud recommended the services of the Memphis Area Legal Services, if the Hes could not afford to hire an attorney.

Accordingly, the trial court concluded that there was no conspiracy to deprive the Hes of their right to due process regarding the custody of A.M.H., and the Hes did not suffer a deprivation of their constitutional rights during the course of transferring custody of A.M.H. to the Bakers.

Next, the trial court made findings regarding the Bakers' petition to terminate the Hes' parental rights. The Bakers filed their petition on June 20, 2001, four (4) months and twenty (20) days after the incident at the Bakers' home on January 28, 2001 which, consequentially, was the last time the Hes visited with AMH prior to the petition being filed. Regarding the Bakers' allegation that the Hes abandoned AMH by failing to support her, the trial court concluded that, between January 28, 2001 and June 20, 2001, the Hes had the ability to pay child support for AMH. The trial court found their ability to provide child support to be evidenced by their May 2001 petition to modify custody wherein they stated as much; the fact that they sent $1,000 to China to provide

support for their son Andy; the Hes purchased a new computer shortly after sending their son to China; the Hes took vacations to various American cities between June 4,1999 and June 20, 2001; and their ability to pay $625 monthly rent during the relevant time period. Although there was no court order requiring the Hes to pay child support, the trial court concluded that the Hes knew they had an obligation to support AMH. The court found that the Bakers' refusal to accept monetary compensation from the Hes did not relieve the Hes of their obligation to support AMH because the Bakers could not accept money pursuant to their agreement with Mid-South, and they did not expect the Hes to provide support because they agreed to raise AMH until she turned eighteen. As for the items the Hes brought to AMH during their visits, the trial court determined the items to be "of insubstantial economic value and amounted to token support." The trial court deemed such token support to be "consistent with the Hes' intent to absolve themselves of all parental responsibilities to AMH."

Next, the trial court examined the Bakers' allegation that the Hes abandoned AMH by failing to visit her during the four months preceding the petition to terminate the Hes' parental rights. The court noted the following relevant facts: the Hes did not visit AMH between January 28, 2001 and June 20, 2001; the trial court found the Hes' reasons for not returning to the Bakers' home after January 28, 2001 to visit AMH to be lacking in credibility; while the Bakers were

willing to allow the Hes to visit, the Hes never called and requested any visitation with AMH after January 28, 2001; although Mother called the Bakers' home on April 2, 2001, her telephone call did not ask for visitation; and immigration officials contacted Father in March, April, or May of 2001, around the time the Hes filed the April 2001 petition to modify the custody order.

Based on the aforementioned facts, the trial court concluded that the Hes abandoned AMH by willfully failing to visit and willfully failing to support her during the four months prior to the Bakers' filing their petition to terminate the Hes' parental rights. The trial court then engaged in a lengthy analysis of the best interest factors and concluded that terminating the Hes' parental rights was in the best interest of A.M.H. Thereafter, the Hes filed a timely notice of appeal to this Court seeking appellate review of the trial court's rulings in this case.

II. Issues Presented

The Appellants have presented sixteen issues to this Court setting forth numerous alleged errors by the trial court. The Appellees have joined the Appellants by raising numerous issues of their own which, upon review, merely constitute counter-arguments to the issues put forth by the

Appellants. We have chosen to restate the issues raised by the Appellants on appeal as follows:

1. Whether the trial court erred in denying several pre-trial motions filed by the Appellants, specifically:
   (A) Did the trial court err in denying the Appellants' motion, pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure, to set aside the June 4, 1999 consent custody order entered by the juvenile court;
   (B) Did the trial court err in denying the Appellants' motion to dismiss the Appellees' petition for adoption;
   (C) Did the trial court err in denying the Appellants' motion to bifurcate the proceedings below;

2. Whether sections 36-1-102 and 36-1-113 of the Tennessee Code violate the Fifth and Fourteenth Amendments to the United States Constitution because they fail to require that natural parents receive prior actual notice of certain information related to the termination of parental rights in the context of a private custody agreement;
3. Should the aforementioned statutes be deemed constitutional, whether the trial court erred in failing to apply the notice provisions found in section

37-2-403 of the Tennessee Code when the child at issue was placed in the foster care of an agency;

4. Whether the trial court erred in failing to apply the "superior parental rights doctrine" to Mother's petition to modify the custody June 4,1999 custody order entered by the juvenile court, thereby rendering a decision on the termination of Mother's parental rights moot;

5. Whether the trial court erred in applying the statutory grounds for terminating a biological parent's parental rights and in finding the existence of clear and convincing evidence to support such grounds, specifically:

   (A) Did the trial court err in its application and interpretation of Tennessee law governing the "settled purpose doctrine";

   (B) Did the trial court err by finding that the Appellants' willfully abandoned their daughter by willfully failing to visit and willfully failing to support her for the requisite statutory period; and

   (C) Did the trial court err in finding that Father was not the "legal parent" of the child when the Appellees' filed their petition to terminate his parental rights;

6. Whether the trial court erred in finding that termination of the Appellants' parental rights is in the best interest of the child in this case.

The Appellees have raised, as we perceive them, two independent issues for our review:

7. Whether the trial court erred in consolidating Mother's petition to modify the June 4, 1999 consent custody order with the Appellees' petition to adopt the child and to terminate the Appellants' parental rights; and
8. Whether the trial court erred in finding that the "persistent conditions" ground for termination did not apply in the instant case because the ground requires the removal of the child by a state agency.

In addition to the arguments raised by the parties on appeal, we are presented with the additional arguments of amici curiae arguing various issues in favor of the Hes on appeal. Specifically, the Childlaw Center of the Loyola University Chicago School of Law, Vanderbilt School of Law Legal Clinic, The University of Memphis School of Law Child Advocacy Clinic, and the Tennessee Alliance for Legal Services (hereinafter collectively referred to as "Amici") have submitted a combined brief and were permitted to present oral argument to this Court. Their brief primarily addresses the

bifurcation issue, the persistent conditions issue, and the standard to be applied to a determination of abandonment. We have also been presented with a brief filed by the Greater Seattle Chapter of the Organization of Chinese Americans, Inc., (hereinafter referred to as "Greater Seattle") addressing social science information specific to the cultural issues present in this appeal. The Embassy of the People's Republic of China (hereinafter referred to as the "Chinese Embassy") has also submitted a letter to this Court expressing its position regarding the "one-child policy" in effect in China.

In reaching a decision on the various issues presented in this case, we have reviewed all of the briefs and materials filed in this Court, the voluminous record created by the trial in this matter, and the arguments of counsel presented at oral argument. Upon doing so, we affirm in part and reverse in part the trial court's decisions in this case.

III. STANDARD OF REVIEW

"A biological parent's interest in the care, custody, and control of his or her child is among the oldest of the judicially recognized fundamental liberty interests." ***Ray v. Ray***, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001) (citing ***Troxel v. Granville***, 530 U.S. 57, 65 (2000)). This fundamental right is protected not only by the Due Process Clause of the Fourteenth Amendment, ***Santosky v. Kramer***, 455 U.S. 745,753 (1982); ***Stanley v. Illinois***, 405 U.S.

645,651 (1972), but also by Article I, section 8 of the Tennessee Constitution as well, ***Blair v. Badenhope***, 11 S.W.3d 137,141 (Tenn. 2002); ***Hawk v. Hawk***, 855 S.W.2d 573, 579 (Tenn. 1993). However, the right to the care, custody, and control of one's children is not absolute, and "[i]t continues without interruption only as long as a parent has not relinquished it, abandoned it, or engaged in conduct requiring its limitation or termination." ***In re*** S.M., 149 S.W.3d 632, 638-39 (Tenn. Ct. App. 2004) (citations omitted); ***see also In re C. W. W.***, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000).

"The grounds for terminating parental rights in Tennessee are defined by statute." *Jones v. Garret*, 92 S.W.3d 835, 838 (Tenn. 2002); see also Tenn. Code Ann. § 36-1-113(g) (2003). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." ***Means v. Ashby,*** 130 S.W.3d 48,54 (Tenn. Ct. App. 2003) (citing Tenn. Code Ann. § 36-1-113(*l*)(1) (2003)). Because of the gravity of the consequences associated with terminating a biological parent's parental rights to a child, the individuals or entities seeking to terminate the parental rights of the biological parents must prove the existence of the statutory grounds for termination by clear and convincing evidence. ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing ***Santosky***, 455 U.S. at 769-70); ***see also*** Tenn. Code Ann. §

36-1-113(c)(l) (2003); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002) (noting that clear and convincing evidence as to any one of the statutorily enumerated grounds will justify the termination of a biological parent's parental rights to a minor child); ***In re M.J.B.***, 140 S.W.3d 643,653 (Tenn. Ct. App. 2004). The statute also requires that parties seeking to terminate a biological parent's parental rights demonstrate that doing so is in the best interest of the child. See Tenn. Code Ann. § 36-1-113(c)(2) (2003); ***In re S.M.***, 149 S.W.3d at 639.

The heightened clear and convincing standard of proof applicable to these cases serves to prevent the unwarranted termination of the biological parents' parental rights in their minor children. ***In re M.W.A.***, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). "The 'clear and convincing evidence' standard defies precise definition." ***Means***, 130 S.W.3d at 54. This Court has formulated the following explanation of the standard when reviewing cases of this nature:

> This court recently attempted to describe the clear and convincing evidence standard, explaining that[:]
>
> [A]lthough it does not require as much certainty as the "beyond a reasonable doubt" standard, the "clear and convincing evidence" standard is more exacting than the "preponderance of the evidence" standard. *O'Daniel v. Messier*, 905 S.W.2d 182, 188

> (Tenn. App. 1995); *Brandon v. Wright*, 838 S.W.2d 532,536 (Tenn. App. 1992). In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992); *O'Daniel v. Messier*, 905 S.W.2d at 188. Such evidence should produce in the fact- finder's mind a firm belief or conviction as to the truth of the allegations sought to be established. *O'Daniel v. Messier*, 905 S.W.2d at 188; *Wiltcherv. Bradley*, 708 S.W.2d 407, 411 (Tenn. App. 1985). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is "highly probable" as opposed to merely "more probable" than not. *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *Goldsmith v. Roberts*, 622 S.W.2d 438, 441 (Tenn. App. 1981); *Brandon v. Wright*, 838 S.W.2d at 536.

In re C.W.W., 37 S.W.3d 467, 473-74 (Tenn. Ct. App. 2000) (quoting *In re M.C.G.*, No. 01A01-9809-JV-00461, 1999 Tenn. App. LEXIS 327, at *6 (Tenn. Ct. App. May 26, 1999) (no perm. app. filed)); *see also Means*, 130 S.W.3d at 54-55.

"Because of the gravity of their consequences, proceedings to terminate parental rights require individualized decision making." ***In re M.J.B.***, 140 S.W.3d 643,653 (Tenn. Ct. App. 2004) (citing *In re Swanson*, 2 S.W.3d 180, 188

(Tenn. 1999)). To that end, the trial court is required to "enter an order which makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing." Tenn. Code Ann. § 36-1-113(k) (2003). These findings facilitate appellate review[12] of parental

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[12] We are cognizant of the following statutory duty placed upon this Court by the legislature regarding appellate review of parental termination cases:

> In all cases which are appealed from the decision of a trial court, the appellate court shall, consistent with its rules, expedite the contested termination of parental rights or adoption case by entering such scheduling orders as are necessary to ensure that the case is not delayed, and such case shall be given priority over all other civil litigation in reaching a determination on the status of the adoption, other than child protective services cases arising under title 37, chapter 1, parts 1,4 and 6.

Tenn. Code Ann. § 36-1-124(b) (2003). On May 12, 2005, Mr. Parrish, counsel for the Bakers, filed the "Appellees' Motion to Dismiss Appeal" with this Court arguing that the Hes' appeal should be dismissed pursuant to the statute of repose codified at section 36-1-113(q) of the Tennessee Code. Mr. Parrish asserted that, since one year had elapsed since the trial court issued its order in this case, this Court no longer possessed subject matter jurisdiction to entertain the appeal. On May 17,2005, this Court issued an Order denying the Bakers' motion. We concluded that the legislature did not intend for section 36-1-113(q) to divest the appellate courts of

termination cases, and in the absence of such findings, we must vacate the judgment and remand the case to the trial court for the entry of findings of fact and conclusions of law in compliance with the statute. ***See White v. Moody***, No. M2004-01295-COA-R3-PT, 2004 Tenn. App. LEXIS 890, at *11-14 (Tenn. Ct. App. Dec. 30,2004) (perm. app. denied, 2005 Tenn. LEXIS 265 (Mar. 21, 2005)); *In re M.J.B.*, 140 S.W.3d at 654; ***In re Adoption of Muir***, No. M2002-02963-COA-R3-CV, 2003 Tenn. App. LEXIS 831, at *8-10 (Tenn. Ct. App. Nov. 25,2003) (no perm. app. filed).

Based on the aforementioned principles of law, this Court has formulated the following standard of review to govern appellate review of parental termination cases:

> Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c)(l), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact *de novo* in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by

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this state of subject matter jurisdiction to evaluate a parental termination order that was timely filed in the appellate court.

> the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent's parental rights. *Jones v. Garret*, 92 S.W.3d at 838; *In re Valentine*, 79 S.W.3d at 548-49; *In re Adoption of Muir*, 2003 Tenn. App. LEXIS 831, 2003 WL 22794524, at *2; *In re Z.J.S.*, 2003 Tenn. App. LEXIS 415, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *10 (Tenn. Ct. App. June 3,2003) (No Tenn. R. App. P. 11 application filed); *Ray v. Ray*, 83 S.W.3d at 733; *In re L.S.W.*, 2001 Tenn. App. LEXIS 659, No. M2000-01935-COA-R3-JV, 2001 WL 1013079, at *5 (Tenn. Ct. App. Sept. 6, 2001), *perm. app. denied* (Tenn. Dec. 27, 2001).

In re M.J.B., 140 S.W.3d at 654. Moreover, we are mindful that cases of this nature often hinge on the testimony of the witnesses at trial and, in turn, the trial court's findings regarding the credibility of those witnesses. Accordingly, we are bound by the following additional principle of law:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. See

State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25,29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Wither spoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics. Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999); ***see also Jones v. Garret***, 92 S.W.3d 835, 838 (Tenn. 2002); *In re C.T.S.*, 156 S.W.3d 18,22 (Tenn. Ct. App. 2004).

IV.
DISCUSSION

The crux of this appeal is whether the trial court erred in finding that the Bakers proved, by clear and convincing

evidence, that the Hes abandoned A.M.H. by willfully failing to visit and willfully failing to support her for the four months immediately preceding the filing of the Bakers' petition to terminate the Hes' parental rights. However, before we are able to reach the issues related to the trial court's findings in that regard, we must address other issues presented by the parties.

A. Order Consolidating the Bakers' Petition with Mothers' Petition to Modify Custody

On May 29,2001, Mother filed her petition in the juvenile court requesting a modification of the June 4, 1999 consent custody order. On June 20, 2001, the Bakers filed their "Petition for Adoption and Termination of Parental Rights" in the chancery court. This effectively vested the chancery court with "exclusive jurisdiction of all matters pertaining to the child . . . except for allegations of delinquency, unruliness or truancy of the child pursuant to title 37." Tenn. Code Ann. § 36-1-116(1) (2003); ***see also State v. R.S.,*** No. M2002-00919-COA-R3-CV, 2003 Tenn. App. LEXIS 657, at *65 (Tenn. Ct. App. Sept. 11, 2003) (no perm. app. filed). ("The exclusive jurisdiction of juvenile court is superseded when a petition for termination of parental rights is filed in another court with concurrent jurisdiction to make that determination."). On September 13, 2003, the Bakers filed a motion asking the chancery court to consolidate, for joint trial, their petition to terminate the Hes'

parental rights with Mother's petition to modify the June 4,1999 consent order entered by the juvenile court. On March 29, 2004, after the parties finished presenting evidence in this case, the chancery court entered an order granting the Bakers' motion to consolidate.

Strangely enough, the Bakers now ask this Court to determine whether the trial court erred in granting their motion at trial. Rule 6(a)(l) and (a)(3) of the Rules of the Court of Appeals of Tennessee provides that written argument by a party shall contain a statement indicating the erroneous action by the trial court and how the party was prejudiced by such error. The section of the Appellees' brief addressing this issue fails to assert any basis for finding error on the part of the trial court in granting their motion. Instead, the Appellees devote their entire argument in this section of the brief to issues unrelated to the question they ask this Court to decide. Accordingly, we find this issue to be wholly without merit.

B. Propriety of the Chancery Court's Rulings on Certain Pre-Trial Motions Filed by the Hes

On appeal, the Hes take issue with the chancery court's rulings on various matters prior to the trial in this matter. In turn, we will address the merits of these issues collectively in this section of the Opinion.

1. Motions to Set Aside the June 4,1999 Consent Custody Order Pursuant to Rule 60.02

On appeal, the Hes argue that the chancery court erred in denying their motions to set aside the juvenile court's June 4, 1999 consent order awarding custody of A.M.H. to the Bakers. On September 12,2003, the Hes filed a motion with the trial court asking the chancery court to set aside, pursuant to Tenn. R. Civ. P. 60.02,[13] the June 4, 1999 consent order. In this motion, the Hes conceded that the June 4, 1999 order provides that the Hes "have been fully advised of their legal rights and that a hearing before the Court is hereby expressly waived." However, they argued that, in reality, they were not fully advised of their legal rights prior to signing the order. They point to the following facts to support this assertion:

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[13] The Hes relied on the following provisions of the rule in support of their motion:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: ... (3) the judgment is void; ... or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time ....
>
> Tenn. R. Civ. P. 60.02 (2004).

Mother did not receive legal advice prior to signing the order; Mr. Weaver met with Father on June 2, 1999, but he did not meet with Mother prior to the date they signed the order; on the day they went to juvenile court to sign the order, Ms. Chunn, Ms. Cloud, and Pastor Yau, all unlicensed attorneys, attempted to advise Mother of the document's meaning, but they did not read it to her; and the juvenile court did not conduct a hearing to ensure that the Hes understood what they had been told up to that point or to explain the purpose and effect of the order. According to the Hes, these facts establish that they were not fully advised of their rights and did not expressly waive their right to a hearing as the order states, therefore, the consent order should be deemed void *ab initio*. On September 25,2003, the Hes filed an amended motion wherein they argued that, in addition to the arguments contained in the aforementioned motion, the consent order should be vacated because the juvenile court failed to comply with sections 34-2-101, 34-2-103, 34-2-104, and 32-2-105 of the Tennessee Code. These arguments were aimed at addressing the "guardianship of the person" language which Ms. Cloud testified she inserted into the order based on her understanding of the facts.

On April 7, 2004, the chancery court entered an order denying the Hes' first motion concluding, in relevant part, as follows:

The Consent Order Awarding Custody, signed by both Respondents, entered in Juvenile Court on June 4, 1999, states that the parties were fully advised of their legal rights. The Court finds that Mr. He was fully advised of his legal rights by Attorney Weaver. The Court also finds that Mrs. He voluntarily waived her right to receive legal advice by not attending the meeting, by telling Mr. He that she was ready to proceed, and by relying on Mr. He to communicate Attorney Weaver's explanation of the parties' rights to her. Thus, the Consent Order Awarding Custody entered on June 4, 1999, is not facially defective, nor is it void ab initio or voidable pursuant to Rule 60.02(3) and (5) of the Tennessee Rules of Civil Procedure.

The Consent Order Awarding Custody was entered by the Juvenile Court on June 4, 1999. There was no motion filed to set aside the Consent Order. The Respondents filed their first Petition to Modify the custody order in Juvenile Court on May 3, 2000, and Respondents made no request in that Petition to set aside the Consent Custody Order. The Juvenile Court denied the May 3,2000,

Petition to Modify on June 28,2000. No appeal was taken by Respondents to the Order Denying the Petition to Modify. The Respondents filed a second Petition to Modify the Consent Custody Order in Juvenile Court on April 9,2001. Again, the Respondents made no request to set aside the Consent Custody Order. The Petitioners herein, the Bakers, then filed their Petition for Adoption and Termination of Parental Rights on June 20, 2001, and the matter was transferred to this court. Respondents filed an answer and an amended answer to the Petition for Adoption and Termination of Parental Rights and neither the answer nor the amended answer contained a request to set aside the June 4, 1999, Consent Custody Order pursuant to Rule 60.02. Then the Respondents filed the instant motion on September 12,2003, approximately four years and three months after the entry of the June 4,1999 Consent Order Awarding Custody. T.R.C.P. 60.02 requires that this type of motion be made within a reasonable time. The Court finds that this motion was not filed within a reasonable time. Furthermore, the Court finds that Respondents' Motion Pursuant to Rule 60.02

to Set Aside Consent Order Awarding Custody Entered June 4, 1999, is barred by res judicata, collateral estoppel and the doctrine of laches.

On May 12, 2004, the chancery court entered another order addressing the Hes' amended petition, wherein the chancery court denied the Hes' amended motion and concluded that the juvenile court complied with the applicable statutes when entering the order.

Rule 60.02 is "designed to strike a proper balance between the competing principles of finality and justice." ***Jerkins v. McKinney***, 533 S.W.2d275,280(Tenn. 1976). "The relief provided under Rule 60.02 is an exceptional remedy," ***Nails v. Aetna Ins. Co.***, 834 S.W.2d 289,294 (Tenn. 1992) (citing *Toney v. Mueller* Co., 810 S.W.2d 145,146 (Tenn. 1991)), "the purpose of which 'is to alleviate the effect of an oppressive or onerous final judgment,'" ***Black v. Black***, 166 S.W.3d 699, 703 (Tenn. 2005) (quoting ***Killion v. Dep't of Human Services***, 845 S.W.2d212,213 (Tenn. 1992)). "Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality embedded in our procedural rules." ***Thompson v. Firemen's Fund Ins. Co.***, 798 S.W.2d 235,238 (Tenn. 1990). However, due to the importance of finality in cases, "the 'escape valve' should not be easily opened." ***Banks v. Dement Constr. Co., Inc.***, 817 S.W.2d 16, 18

(Tenn. 1991)(quoting ***Toney v. Mueller***, 810 S.W.2d 145, 146 (Tenn. 1991)).

"To set aside a judgment under rule 60.02 the burden is upon the movant to prove that he is entitled to relief, and there must be proof of the basis on which relief is sought." ***Id; see also Henry v. Goins***, 104 S.W.3d 475, 482 (Tenn. 2003). When reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we employ the following standard of review:

> [W]e give great deference to the trial court. *See Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94,97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. *See id.* An abuse of discretion is found only when a trial court has '"applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Henry, 104 S.W.3d at 479; see also Banks, 817 S.W.2d at 18.

The Hes go to great efforts to explain their lack of notice and lack of adequate counsel prior to signing the order at issue. However, we are cognizant of the fact that these issues were a matter of contention at trial. Both parties presented testimony addressing the issue of whether the Hes understood the purpose and effect of the June 4, 1999 consent order awarding custody of A.M.H. to the Bakers. Based on the testimony offered at trial, the chancery court held that the Hes were adequately informed of the order's purpose and effect, and the Hes either had adequate counsel or had an opportunity to seek counsel regarding this issue. We give these credibility determinations great weight on appeal, and we find no clear and convincing evidence in the record to justify reaching a different conclusion regarding such testimony. ***See Wells v. Tenn. Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999).

Of the most significance to our analysis of this issue is the realization that Rule 60.02 requires that the motion "shall be made within a reasonable time." Tenn. R. Civ. P. 60.02 (2004). What constitutes a reasonable time is a question of fact, and not a question of law. *See* ***Thompson***, 798 S.W.2d at 238; *Rogers v. Estate of Russell*, 50 S.W.3d 441, 445 (Tenn. Ct. App. 2001). On appeal, the Hes fail to offer any justification for why they waited in excess of four years to file their Rule 60.02 motion. Any argument that they did

not understand the need to file the motion or did not have adequate representation to advise them to file such a motion must fail. As the trial court noted in its order, the Hes had access to legal representation (as evidenced by the various attorneys representing them in their civil and criminal matters) both before and after the June 4,1999 custody order was entered. Even after the June 4,1999 order had been entered, Ms. Cloud instructed the Hes during a subsequent visit to juvenile court to hire a lawyer or seek counsel through legal services, which they chose not to do. Moreover, after the Bakers filed their petition to terminate the Hes' parental rights on June 20, 2001, the Hes' attorney, Mr. Sossaman, filed an answer on their behalf shortly thereafter. Despite having a lawyer dedicated solely to addressing the Bakers' petition at this stage in the litigation, the Hes waited until September 12,2003, over one year after the Bakers filed their petition, to file their Rule 60.02 motion in this case. Accordingly, we find that the Hes did not file their Rule 60.02 motion within a reasonable time as required by the rule, and we affirm the trial court's ruling on this issue.

2. Order Denying Hes' Motion to Dismiss Bakers' Petition for Adoption

The Hes filed a motion with the trial court on October 2,2003, asking the court to enter an order dismissing the Bakers' adoption petition. In support of their petition, the Hes

relied on section 36-1-119(d) of the Tennessee Code, which provides as follows:

> If no appeal has been taken from any order of the court, the court *must* complete or dismiss the *adoption proceeding* by entering a final order *within two (2) years of the filing of the petition*, unless the petitioner shows good cause why such final order should not be entered.

Tenn. Code Ann. § 36-1-119(d) (2003) (emphasis added). The Bakers filed their petition to adopt A.M.H. and terminate the Hes' parental rights to A.M.H. on June 20, 2001. As of June 20, 2003, their petition had been pending for two years. The Hes argue that the Bakers failed to request an extension of time under Rule 6.02 of the Tennessee Rules of Civil Procedure, which provides:

> When by *statute* ... an act is required or allowed to be done at or within a specified time, the court/or *cause shown* may, at any time in its discretion, (1) with or without motion or notice order the period enlarged if request thereof is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the

> specified period permit the act to be done, *where the failure to act was the result of excusable neglect....*

Tenn. R. Civ. P. 6.02 (2004) (emphasis added). The Hes argued at trial, and again on appeal, that, since the Bakers did not file a request for an extension of time under Rule 6.02, they cannot show "good cause" for extending the two year period and that they cannot establish that their failure to file such request constitutes "excusable neglect." Accordingly, the Hes urged the trial court, and now this Court, to find that the Bakers' adoption petition must be dismissed pursuant to the statute. On April 6, 2004, the trial court entered an order denying the Hes' motion noting that the court had before it a petition for adoption coupled with a petition to terminate the Hes' parental rights.

Prospective adoptive parents have standing to petition a court to terminate the parental rights of the biological parents, and they may include in their petition for adoption a request that the parental rights of the biological parents be terminated. ***See*** Tenn. Code Ann. § 36-1-113(b) (2003). Thus, the chancery court properly had before it an adoption petition containing a request to terminate the Hes' parental rights. Section 36-1-113 of the Tennessee Code, governing termination of parental rights, recognizes that a petition for adoption and petition for termination of parental rights are two distinct legal processes. ***See*** Tenn. Code Ann. §

36-1-113(b), -113(d)(4), -113(/)(1), -113(/)(2), -113(m), -113(p) (2003). "The conclusion is that the state and federal constitutions require that the natural [parent's] parental rights be determined before the court may proceed with the issue of adoption." ***Nale v. Robertson***, 871 S.W.2d 674, 680 (Tenn. 1994) (finding invalid a statute which allowed a court to enter a decree of adoption based on the best interest of the child without first determining if the biological parent's parental rights should be terminated); ***see also Jones v. Garret***, 92 S.W.3d 835, 840 (Tenn. 2002) (reaffirming the Court's prior statement in *Nale*). Section 36-1-119 of the Tennessee Code requires the trial court to "complete or dismiss the adoption proceeding . . . within two (2) years of the filing of the petition." Tenn. Code Ann. § 36-1-119(d) (2003) (emphasis added).

The Hes have cited to a decision by our supreme court in ***Clements v. Morgan***, 296 S.W.2d 874 (Tenn. 1956), in support of their position on appeal. In *Clements*, the supreme court, when dealing with the precursor to the present statute, held that the statute required an adoption petition to be completed or dismissed within two years, and the statute "must be strictly complied with." ***Clements***, 296 S.W.2d at 96-97. However, the decision in *Clements* is easily distinguished from the facts in the present case, in *Clements*, the only petition filed in the trial court was one for adoption. *Id.* at 95. There was no need to adjudicate the issue of terminating the biological parent's parental rights because the

biological parents filed a written consent agreeing to allow the petitioners to adopt the child. *Id.* It was only when the Tennessee Department of Children's Services sought to intervene in the case that the adoption petition was delayed beyond the two year statutory period. *Id.* at 96. In the present case, the trial court was faced with a petition to terminate the parental rights of the Hes along with a petition to adopt A.M.H. As our supreme court instructed in *Name*, the trial court must necessarily determine if a termination of parental rights is warranted before it may proceed to the adoption petition. Accordingly, we affirm the trial court's decision to deny the Hes' motion.

3. Motion to Bifurcate the Proceedings

On June 23,2003, the Hes filed a motion asking the trial court to bifurcate the proceedings in this matter. Specifically, the Hes asserted that, pursuant to the statutory and case law governing termination of parental rights, the trial court was required first to determine whether the Bakers proved that the Hes' willfully abandoned A.M.H. by clear and convincing evidence. After concluding a proceeding on the grounds for termination, only then could the court conduct a separate proceeding to address the best interest analysis. After conducting a hearing on the Hes' motion, the chancery court entered an order on January 28,2004, *nuncpro tune* to September 4,2003, denying the Hes' motion.

Section 36-1-113(c) of the Tennessee Code provides as follows:

> (c) Termination of parental or guardianship rights must be based upon:
>
> (1) A finding by the court by clear and convincing evidence that the grounds for termination or parental or guardianship rights have been established; and
>
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.

Tenn. Code Ann. § 36-1-113(c) (2003). On appeal, the Hes argue that section 36-1-113(c) of the Tennessee Code implies that a court must conduct a separate evidentiary hearing to address the grounds for termination and the best interest of the child before it may terminate parental rights. They also cite to a decision by this Court, wherein we stated that "[b]efore the court may inquire as to whether termination of parental rights is in the best interest of the child, the court first must determine that the grounds for termination have been established by clear and convincing evidence." **K.S.O.H. v. J.W.B., Jr.**, No. E2001-00055-COA-R3-CV, 2001 Tenn. App. LEXIS 740, at *11 (Tenn. Ct. App. Oct. 4, 2001) (no perm. app. filed). The Hes contend that a bifurcated

proceeding would ensure that the trial court could decide the existence of grounds for termination without being influenced by evidence tending to prove that termination is in the best interest of the child.

The Hes' argument is echoed by the Amici in their brief. In addition, the Amici argue that federal precedent requires bifurcation, directing our attention to the United States Supreme Court's decision in ***Santosky v. Kramer***, 455 U.S. 745 (1982). In *Santosky*, the Court made the following observation:

> The State bifurcates its permanent neglect proceeding into "factfinding" and "dispositional" hearings. Fam. Ct. Act §§ 622,623. At the factfinding stage, the State must prove that the child has been "permanently neglected," as defined by Fam. Ct. Act §§ 614.1 .(a)-(d) and Soc. Serv. Law § 384-b.7.(a). *See* Fam. Ct. Act § 622. The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. §§ 623,631.

Santosky, 455 U.S. at 748. It is clear, however, that the Court in *Santosky* was summarizing a state statute *requiring*

bifurcation. Section 3 6-1 -113 (c) of the Tennessee Code does not contain a similar requirement.

The Amici also assert that "national precedent" favors bifurcation, and they contend that "[o]ne of the most in-depth rationales for bifurcation" can be found in ***Champagne v. Welfare Division of the Nevada State Department of Human Resources***, 691 P.2d 849 (Nev. 1984). In *Champagne*, the Nevada Supreme Court made the following statement:

> We borrow from Ketcham and Babcock to state the general proposition in these terms: "The jurisdictional question is whether the biological parent, by behavior, has forfeited all rights in the child. The dispositional question is whether terminating parental rights would be in the best interest of the child. The first question focuses on the action, or inaction, of the natural parent. The second focuses on the placement which will be most beneficial to the child. If it is first decided that the parent has forfeited his rights in the children, then the court moves on to the second question. On the other hand, if it is decided that the biological parent's behavior does not violate minimum standards of parental conduct so as to render the parent unfit, then the analysis ends and termination is denied. In these latter instances,

> the court never reaches the question of whether the child's future well-being would be better served by placement with the substitute or psychological parent."

Champagne, 691 P.2d at 647. However, our independent research has revealed that the Nevada Supreme Court overruled its decision in Champagne in 2000, holding as follows: [T]his court in Champagne interpreted the statute and announced a two-step analysis to be applied when deciding whether to terminate parental rights. According to Champagne, the first step in the analysis requires that there be what the court characterized as "jurisdictional" grounds for termination. Id. at 640,691 P.2d at 849 . . . . If jurisdictional grounds for termination are not established, the inquiry ends. Id. at 647, 691 P.2d at 854. If jurisdictional grounds are established, the analysis turns to whether dispositional grounds exist for termination.

In 1987, the legislature responded to our decision in *Champagne*, and again amended the termination statute .... The legislative history indicates that the legislature was concerned that the *Champagne* decision bifurcated the issues regarding children's rights and parent's rights in termination proceedings. *See* Hearing on A.B. 308 Before the Nevada Assembly Committee on Judiciary, 64th Leg. (Nev., March 20,1987).

Our adherence to the *Champagne* standard has resulted in the improper application of the termination statute. The amendments to NRS 128.105 demonstrate the legislature's frustration with *Champagne* and its progeny, which place too much emphasis on the conduct of the parents instead of on the best interests of the child. Clearly, the legislative amendments of NRS 128.105 illustrate the legislature's concern with protecting the best interests of the child.

Accordingly, we now abandon *Champagne's* strict adherence to a finding of parental fault to terminate parental rights before the district court considers the best interests of the child. Application of the *Champagne* standard may have resulted in an artificial determination by the district court concerning parental fault, because such a determination cannot be made without considerations of how the parents' conduct has impacted the child. The impact of parental conduct on the child is, in turn, one consideration in determining the best interests of the child. We will no longer require district courts, in the name of determining parental fault, to consider rigidly and formulaically the conduct of the parents in a vacuum, without considering the best interests of the child. Instead, in conformance with NRS 128.105, we adopt a best interests/parental fault standard for termination cases. Accordingly, the district court in determining whether to terminate parental rights must consider both the best interests of the child and parental fault.

In re Termination of Parental Rights as to N.J., 8 P.3d 126, 130-32 (Nev. 2000).

We are unaware of any case law, and neither the Appellants or the Amici cite to this Court any authority, holding that the federal or state constitutions require that parental termination proceedings in this state must be bifurcated. At present, the legislature of this state has deemed it the policy of this state that parental termination proceedings not be bifurcated. ***See*** Tenn. Code Ann. § 36-1-113(c) (2003) (noting the absence of any directive to the courts of this state to bifurcate termination proceedings). "The Legislature is more or less the body who forms our public policy." ***McKesson & Robinson, Inc. v. Gov't Employees Dep't Store, Inc.***, 365 S.W.2d 890, 894 (Tenn. 1963). As such, we find the following statement by our supreme court to control our resolution of this issue:

> There is nothing in our Constitution from which it can be inferred that a policy different from that stated should never be adopted by the legislature. That being so, the legislative department of the State government has exclusive and ample power to determine the State's policy. When the legislature, acting within its constitutional powers, has spoken upon a particular subject, its utterance is the

> public policy of the State upon that subject, and the courts are without power to read into the Constitution a restraint of the legislature with respect thereto. The prohibition must be expressed or necessarily implied from that which is expressed. We fail to find any such restraint in our Constitution.
>
> ... ["]All questions of policy are for the determination of the legislature, and not for the courts, and there is no public policy which prohibits the legislature from doing anything which the Constitution does not prohibit. Hence the courts are not at liberty to declare a law void as in violation of public policy. . . . Where courts intrude into their decrees their opinion on questions of public policy, they in effect constitute the judicial tribunals as lawmaking bodies in usurpation of the powers of the legislature." 6 R. C. L., section 108, pp. 108,109.

Cavender v. Hewitt, 239 S.W. 767, 768 (Tenn. 1921); *see also* ***Crawford v. Buckner,*** 839 S.W.2d 754, 759 (Tenn. 1992); ***Smith v. Gore***, 728 S.W.2d 738, 746 (Tenn. 1987). As the legislature of Nevada chose to act in light of the Nevada Supreme Court's decision in *Champagne*, so too may the Tennessee legislature act, if it chooses, to require the courts

of this state to conduct a bifurcated proceeding in parental termination cases. In the absence of such direction, however, we affirm the trial court's decision to deny the Hes' motion to bifurcate the proceedings at trial.

a

Constitutionality of section 36-1-102 and section 36-1-113 of the Tennessee Code

The Hes argue that the trial court erred by failing to find that section 36-1-102 and section 36-1-113 of the Tennessee Code violate the protections afforded them by the United States Constitution by failing to require that biological parents receive actual notice of the following: the statutory definition of abandonment; the criteria and procedures used for terminating parental rights; information concerning the law of abandonment; information regarding the necessity for the assistance of counsel; and a warning that failure to visit or failure to support the child for the statutory period may constitute grounds for terminating their parental rights. Specifically, the Hes assert that the lack of notice in this case violated their constitutional rights protected by the Fifth and Fourteenth Amendments to the United States Constitution.

The Hes make reference to the notice provisions found in Title 37, Chapter 2, Part 4 of the Tennessee Code which govern the placement of juveniles. Specifically, the Hes direct our attention to section 37-2-403(a)(2) of the Tennessee Code, which provides, in relevant part, as follows:

(2) (A) The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, *the agency* and the caseworker of such *agency*. Such statements shall include the responsibilities of each party in specific terms and shall be reasonably related to the achievement of the goal specified in subdivision (a)(l). The statement *shall include the definitions of "abandonment" and "abandonment of an infant" contained in* § 36-1-102 *and the criteria and procedures for termination of parental rights*. Each party shall sign the statement and be given a copy of it. The court must review the proposed plan, make any necessary modifications and ratify or approve the plan within sixty (60) days of the foster care placement..

(B) (l) The parents or legal guardians of the child shall receive notice to appear at the court review of the permanency plan or the plan of care and *the court shall explain on the record the law relating to abandonment contained in* § 36-1-102, *and shall explain that the consequences of failure to visit or support the child will be termination of the parents' or*

> *guardians' rights to the child, and the court will further explain that the parents or guardians may seek an attorney to represent the parents or guardians in any termination proceeding.* If the parents or legal guardians are not at the hearing to review the permanency plan or plan of care, the court shall explain to the parents or guardians at any subsequent hearing regarding the child held thereafter, that the consequences of failure to visit or support the child will be termination of the parents' or guardians' rights to the child and that they may seek an attorney to represent the parents or guardians in a termination proceeding.

Tenn. Code Ann. § 37-2-403(a)(2) (2003) (emphasis added). An examination of section 36-1-102 and 36-1-113 of the Tennessee Code, which govern adoptions, reveals the absence of similar notice provisions in those statutes.

In assessing the Hes' arguments related to the constitutionality of the two adoption statutes at issue, we are mindful of the following:

> When faced with such a constitutional assault on a statute, this court must indulge every presumption and resolve every doubt in favor

> of the constitutionality of the legislative enactment. *See Riggs v. Burson*, 941 S.W.2d44,51.(Tenn.), *cert, denied*, 522 U.S. 982,139 L. Ed. 2d 380, 118 S. Ct. 444 (1997); *Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). The party challenging the constitutionality of a statute "bears a heavy burden of overcoming that presumption." *Helms v. Tennessee Dep't of Safety*, 987 S.W.2d 545, 550 (Tenn. 1999).

In re Adoption of M.J.S., 44 S.W.3d 41,61 (Tenn. Ct. App. 2000); ***see also Gallaher v. Elam***, 104 S.W.3d 455, 459 (Tenn. 2003); ***In re Adoption of Female Child***, 42 S.W.3d 26, 31-32 (Tenn. 2001).

The Hes assert that, since they have a fundamental right to the care, custody, and control of their daughter, ***see Troxel v. Granville***, 530 U.S. 57,65 (2000); ***Santosky v. Kramer***, 455 U.S. 745, 753 (1982); ***Hawk v. Hawk***, 855 S.W.2d 573, 579 (Tenn. 1993), the Fifth and Fourteenth Amendments to the United States Constitution require that the notice provisions applicable to cases involving the Tennessee Department of Children's Services apply with equal force to non-agency custody arrangements between private individuals as well. The parties do not dispute that the Hes never received any of the forms of notice required by section 37-2-403(a)(2) of the Tennessee Code at any time

before or after the juvenile court entered the consent order on June 4,1999 transferring custody of A.M.H. to the Bakers. The Hes contend that, had they received this information, they would have taken additional steps to prevent the termination of their parental rights.

In support of their position on appeal, the Hes cite to the following statement by the United States Supreme Court in *Santosky v. Kramer*:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky, 455 U.S. at 753-54 (emphasis added). The Hes also seek to persuade this Court to apply a notice requirement similar to that found in section 37-2-403(a)(2) of the Tennessee Code to private custody agreements by citing to the decisions of this Court applying that statute and holding that a parent's failure to receive the required statutory notice warranted a reversal of the trial court's finding of abandonment. ***See In re S.M.***, 149 S.W.3d 632,637-38 (Tenn. Ct. App. 2004); ***State v. Demarr,No.*** M2002-02603-COA-R3-JV, 2003 Tenn. App. LEXIS 569, at *29-32 (Tenn. Ct. App. Aug. 13,2003) (no perm. app. filed); ***In re J.J.C.***, 148 S.W.3d 919,926-27 (Tenn. Ct. App. 2004); ***In re C.L.H.***, No. M2000-02799-COA-R3-JV, 2001 Tenn. App. LEXIS 424, at * 13-15 (Tenn. Ct. App. June 5, 2001) (no perm. app. filed); ***Pierce v. Bechtold***, 448 S.W.2d 425, 429-30 (Tenn. Ct. App. 1969).

The Fourteenth Amendment to the United States Constitution provides as follows: "nor shall *any State* deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[14] U.S. Const, amend. XIV, §1. In

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[14] We also note that the Hes have asserted a violation of the Fifth Amendment to the United States Constitution as well. The Fifth Amendment has been repeatedly held to apply to actions by the federal government, not the state government. *See* ***Camden Fire Ins. Ass'n v. Haston***, 284 S. W. 905,908 (Tenn. 1925); *State v. Norvell*, 191 S.W. 536, 539 (Tenn.

addressing claims premised upon the Fourteenth Amendment, the Tennessee Supreme Court has noted:

> It is well established that the due process protections of the Fourteenth Amendment do not come into play *unless there is some action on the part of the State. See Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 68 S. Ct. 836 (1948); *State ex rel. Hawkins v. Luttrell*, 221 Tenn. 32, 424 S.W.2d 189,190 (Tenn. 1968); *State ex rel. Johnson v. Heer*, 219 Tenn. 604, 412 S.W.2d 218, 219 (Tenn. 1966). Therefore, in order to state a cause of action for a due process violation under the Fourteenth Amendment, *state action must be alleged*.

City of Cookeville v. Humphrey, 126 S.W.3d 897, 906 (Tenn. 2004) (emphasis added); ***see also State ex rel Johnson v. Heer***, 412 S.W.2d 218, 219 (Tenn. 1966) ("[I]n order for the defendant's rights under the Fourteenth Amendment to come into play, there must be some action on the part of the State

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1916). The Hes fail to demonstrate any action on the part of the federal government regarding their lack of notice in this case. Accordingly, this component of their argument is without merit.

that deprives him of due process of law and/or equal protection of the law.").

The Hes focus their arguments on appeal to a lack of notice regarding the abandonment ground for terminating parental rights, however, they do not specifically state which individuals or entities were constitutionally required to provide them notice. Section 36-1-102(1) of the Tennessee Code, which defines "abandonment," requires the courts of this state to focus on the biological parents' conduct within the four (4) months immediately preceding the filing of the petition to terminate their parental rights. *See* Tenn. Code Ann. § 36-1-102(1)(A) - (E) (2001). Thus, assuming for purposes of our discussion here that a party did have a duty to provide notice to the Hes during this period of time, we must necessarily focus our attention on those individuals or entities which had the ability to influence the behavior of the parents during this statutory period. When Mid-South ceased its involvement in this case on June 4, 1999 (the date of the juvenile court's consent custody order), the Bakers took over responsibility for A.M.H. Thus, it is apparent that the Hes are asserting that the Bakers, private individuals, violated their due process rights by failing to provide them with notice comparable to that required by section 37-2-403 of the Tennessee Code.

Regarding the Bakers, the Hes are unable to establish the requisite state action necessary to pursue their due process claims in this case. Moreover, their reliance on the

aforementioned cases actually undermines their position on appeal. In *In re* J.J.C., *Demarr*, and *In re* C.L.H., the Tennessee Department of Children's Services, a *state agency*, had custody of the children and filed the petition to terminate the parents' parental rights, and this Court addressed the state's failure to provide the required statutory notice to the parents in each of those cases. *In re J.J.C.*, 148 S.W.3d at 92\;*Demarr*, 2003 Tenn. App. LEXIS 569, at *3^\;*In re C.L.H.*, 2001 Tenn. App. LEXIS 424, at *4-5. Thus, in those cases we were dealing specifically with action on the part of the state which affected the parental rights of a parent to their minor child. In *Santosky*, the United States Supreme Court expressly stated that, "[w]hen *the State* moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky*, 455 U.S. at 753-54 (emphasis added). In *In re S.M.*,& licensed child-placement agency filed the petition to terminate the parental rights of the biological parents, but this Court did not address any failure on the part of the agency to provide notice when ruling that the parent did not willfully abandon the child. *In re S.M.*, 149 S.W.3d at 643-44 (finding that the agency failed to present clear and convincing evidence that the biological parent willfully abandoned the child). Our decision in *Pierce* is not persuasive because our decision in that case constitutes a common law ruling which, as the Hes acknowledge in their brief, was handed down prior to the codification of the notice

provisions in section 37-2-403 of the Tennessee Code. *See Pierce*, 448 S.W.2d at 429-30.

In addressing the Fourteenth Amendment to the United States Constitution, the United States Supreme Court has stated as follows:

> It is State action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject-matter of the amendment.* It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.

The Civil Rights Cases, 109 U.S. 3, 11 (1883) (emphasis added). Accordingly, the Hes have no basis to assert that the Bakers, private individuals, violated their Fourteenth Amendment rights regarding A.M.H. by failing to give them the notice which they claim they were entitled to.[15]

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[15] We address the Hes' lack of notice more fully when addressing the grounds for termination *infra*. However, we pause here to note that our independent research has revealed

one decision rendered by this Court after the appeal in the instant case was filed wherein we addressed *& private* custody agreement and a parent's lack of notice regarding abandonment, stating:

> When the Department of Children's Services or other child- placing agency obtains custody of children removed from the parents' home, it is required to notify the parents of the statutory definitions of abandonment and the criteria and procedures for termination of parental rights, Tenn. Code Ann. § 37-2-403(a)(2)(A). In such situations, a court cannot terminate a parent's rights on the ground of abandonment unless such notice, including the consequence of abandonment , has been given by the agency petitioning for termination or the court itself. Tenn. Code Ann. § 37-2-403(a)(2)(B). *In the case before us, neither DCS nor another agency was involved, so the statute does not apply.* Nonetheless, Mother's knowledge of a duty or expectation that she provide support and visit is *a factor in determining willfulness.* We find nothing in the record to indicate she was ever told she was expected to provide support or face termination of her parental rights.

In re W.B., IV, No. M2004-00999-COA-R3-PT, 2005 Tenn. App. LEXIS 262, at *38 (Tenn. Ct. App. Apr. 29,2005) (no perm. App. Filed) (emphasis added). While a parent's knowledge of duty to visit or support may have a bearing

Without explicitly stating as much, the Hes impliedly argue in their brief that the juvenile court also violated their constitutional rights under the Fourteenth Amendment by failing to ensure that they received some form of notice comparable to that found in section 37-2-403 of the Tennessee Code when it entered the June 4,1999 consent order transferring custody of A.M.H. to the Bakers. The United States Supreme Court has recognized that state action may take the form of judicial enforcement of private agreements, stating:

> That the action of state courts *and. judicial officers* in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court .... "A state acts by its legislative, its executive, or its *judicial* authorities. It can act in no other way." In the Civil Rights Cases, 109 U.S. 3,11,17 (1883), this Court pointed out that the Amendment makes void "State action of every kind" which

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when determining willfulness, we cannot say that the Fourteenth Amendment to the United States Constitution mandates that a private individual provide the notifications urged upon the Court by the Appellants in this case.

> is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, *or judicial* or executive proceedings." ***Shelley v. Kraemer***, 334 U.S. 1,14 (1948) (emphasis added).

In any event, we cannot entertain any arguments, even if expressly stated, which attempt to satisfy the state action requirement by pointing to the juvenile court's enforcement of the parties' private custody agreement by entering an order solidifying that agreement. Although the order was the result of a consent agreement regarding custody of A.M.H., the Hes retained their right to appeal the June 4, 1999 order to this Court, as well as the subsequent order denying their first petition to modify that order, and present any alleged constitutional infirmities for resolution. *See* Tenn. Code Ann. § 37-1-159(g) (2003) ("Appeals in all other civil matters heard by the juvenile court shall be governed by the Tennessee Rules of Appellate Procedure."). The Hes failure to file an appeal divests this Court of the ability to review the constitutional validity of the June 4, 1999 order. Once a custody order is final, it becomes *resjudicata* and can only be modified in a subsequent proceeding upon a showing that there had been a material change in circumstances making a change of custody in the child's best interest. ***See In re E.J.M.***, No. W2003-02603-COA-R3-JV, 2005 Tenn. App.

LEXIS 146, at *46 (Tenn. Ct. App. Mar. 10,2005) (no perm. app. filed); ***Rushing v. Rushing***, No. W2003-01413-COA-R3-CV, 2004 Tenn. App. LEXIS 708, at *14 (Tenn. Ct. App. Oct. 27, 2004) (no perm. app. filed).[16] Accordingly, we find the Hes argument in this regard to be without merit.

D.

Application of the Notice Provisions in Section 37-2-403 of the Tennessee Code

The Hes make the alternative argument that, even if the aforementioned statutes are deemed constitutional, the trial court erred by failing to find that the notice provisions found in section 37-2-403 of the Tennessee Code should apply in this case because A.M.H. was in the "foster care"[17] of

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[16] Our supreme court has stated that a custody order may not constitute a final judgment with the accompanying *resjudicata* effect when the juvenile court intends the order to be of temporary effect. *See In re Askew*, 993 S.W.2d 1,4 (Tenn. 1999). We discuss the other related issues raised by the Hes in an attempt to invalidate the June 4, 1999 order *infra*.

[17] "Foster care", for purposes of section 37-2-403 of the Tennessee Code, is defined as follows:

"Foster care" means the temporary placement of a child in the custody of the department of children's services *or any*

an "agency"[18] prior to the date the Bakers filed their petition

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agency, institution or home, *whether public or private*, for care outside the home of a parent or relative (by blood or marriage) of the child, whether such placement is by court order, voluntary placement agreement, surrender of parental rights or otherwise. Foster care shall cease at such time as the child is placed with an individual or individuals for the purpose of the child's adoption by the individual or individuals or at such time as a petition to adopt is filed, whichever occurs first, or at such time as the child is returned to or placed in the care of a parent or relative ....

Tenn. Code Ann. § 37-2-402(5) (2003) (emphasis added).

[18] It is undisputed that Mid-South is a licensed child placement agency. The legislature defines "agency" for purposes of Title 37, Chapter 2, Part 4 as "a child care agency, as defined in title 71, chapter 3, part 5, or in title 37, chapter 5, part 5, regardless of whether such agency is licensed or approved, and includes the department of children's services." Tenn. Code Ann. § 37-2-402(1) (2003). Section 37-5-501 of the Tennessee Code states:

> As used in this part, unless the context otherwise requires: "child care agency" includes: "child abuse agency," "child caring institution," "child placing agency," "detention center," "family boarding home or foster home," "group care home," "maternity home," or "temporary holding resource" as defined in subsection (b).

to terminate the Hes' parental rights. The Hes assert that, while "AMH was not 'technically' in the foster care of an agency following the end of the 90-day foster care period through Mid-South Christian Services," she was in the type of foster care contemplated by section 3 7-2-403 (a)(2) of the Tennessee Code between June 4, 1999 and the date the Bakers filed their petition in this case because the transfer of responsibility for A.M.H. between Mid-South and the Bakers was "seamless." Furthermore, in an effort to demonstrate that Mid-South remained involved after the conclusion of the three month foster care period, the Hes cite to the fact that Mr. Weaver, Mid-South's lawyer, subsequently represented the Bakers in their attempts to contest the Hes' petitions to modify the custody order and filed the petition to terminate the Hes' parental rights. Therefore, they contend that Mid-South remained "interested" in the outcome of the proceedings even though the Hes signed a form acknowledging that Mid-South would no longer be involved in the case.

Just prior to the end of the initial three month foster care period, Ms. Chunn met with Father to discuss the Hes' future plans for A.M.H. When Father indicated that they wanted A.M.H. to remain with the Bakers, Ms. Chunn

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Tenn. Code Ann. § 37-5-501(a) (2003).

advised Father of the adverse effects such an arrangement could have on A.M.H. and counseled against it. At this point, Father met with the Bakers and discussed a *private* arrangement without any involvement of Mid-South. Thereafter, Father and the Bakers called Ms. Chunn to inform her of the parties' decision. Admittedly, Ms. Chunn did facilitate the meeting with Mr. Weaver to discuss the process of transferring custody. However, on June 4, 1999, the day the parties signed the consent order transferring custody, the Hes signed a form which provided as follows:

> Upon signing this form and receiving said child(ren), I (we) assume full responsibility for the child(ren), and discharge Mid-South Christian Services from any further care of the child(ren) beyond this date.

After this date, Mid-South's responsibility for A.M.H. ceased. While the record demonstrates that Ms. Chunn did communicate with the Bakers after that date, we cannot find that this conduct amounts to a continuing effort to provide "foster care." Likewise, we cannot say that the Bakers' independent decision to have Mr. Weaver represent them at a later date equates to a "continuing interest" in the case on the part of Mid-South. There is simply no evidence in the record suggesting that Mid-South directed Mr. Weaver to represent the Bakers or encouraged the Bakers to select Mr. Weaver to represent them. Thus, A.M.H. did not remain in

"foster care" with an "agency" beyond June 4,1999.[19] Accordingly, we find the Hes arguments in this regard to be without merit as well.

E. Superior Parental Rights Doctrine

At the conclusion of the initial three month foster care period, the Hes signed a "Petition for Custody," wherein they asked that "[c]ustody of [A.M.H.] be awarded to *Jerry & Louise Baker, non-relative.*]" On June 4, 1999 the juvenile court entered a "Consent Order Awarding Custody," wherein the juvenile court noted that the Hes admitted the following:

> 1. That they have been fully advised of their legal rights and that a hearing before the Court is hereby expressly waived.
>
> 2. That all parties agree that it is in the best interest of the child(ren) for custody *and*

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[19] In a similar vein, any attempt by the Hes to assert a violation of the Fourteenth Amendment on the part of Mid-South would not be meritorious. As of June 4, 1999, Mid-South no longer had any involvement in this case, and they have not been made a party to the instant controversy. Moreover, the Hes did not appeal the juvenile court's June 4, 1999 order or the subsequent denial of their original petition to modify that order, which would necessarily include an evaluation of Mid-South's conduct up to that point in time.

guardianship of the person of said child to be awarded to Jerry and Louise Baker, non-relatives.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that custody and *guardianship of the person* of said child(ren) be and is hereby awarded to Jerry and Louise Baker, non-relatives with authority to make appropriate plans for the care and supervision of said child(ren).

(emphasis added).[20] On May 29, 2001, Mother filed a "Petition to Modify Order" in the juvenile court alleging that a change in circumstances warranted a change in the custody arrangement set forth in the June 4,1999 order.[21] As previously noted, after the Bakers filed their petition to terminate the Hes' parental rights to A.M.H. in the chancery

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[20] As previously noted, Ms. Cloud typed the italicized language into the order above the phrase "custody to be awarded" and "custody of said child(ren)."

[21] Ms. Cloud testified that, while Father was present at juvenile court when the May 29, 2001 petition was drafted, only Mother signed the petition seeking a modification of the juvenile court's earlier order.

court, the court consolidated Mother's petition with the Bakers' petition at the request of the Bakers.

On appeal, Mother argues that the trial court erred by not applying the "superior parental rights doctrine" when analyzing Mother's May 29, 2001 petition which, if done, would have rendered the Bakers' petition to terminate Mother's parental rights moot. Specifically, Mother asserts that, pursuant to certain enumerated exceptions in our supreme court's decision in ***Blair v. Badenhope***, 11 S.W.3d 137 (Tenn. 2002), the "superior parental rights doctrine" must be applied to her petition to modify the custody order at issue. Conversely, the Bakers contend that the "superior parental rights doctrine" does not apply to the facts in the instant case.[22]

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[22] The Bakers attempt to distinguish *Blair* by pointing to the fact that the non-parent in *Blair* was never awarded guardianship of the minor child as was done in this case. They argue that they have been adjudicated guardians of A.M.H., therefore, the following statute applies:

> A custodian to whom legal custody has been given by the court under this part has the right to the physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care and the right and duty to provide for the care, protection, training and education, and the physical, mental and moral welfare of the child, *subject to the conditions*

Due to the constitutionally protected right of biological parents to the care, custody and control of their

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> *and limitations of the order and to the remaining rights and duties of the child's parents or guardian.* A custodian is also responsible for providing notices as required in § 49-6-3 051, to the principal of the school in which the child is enrolled.

Tenn. Code Ann. § 37- l-140(a) (2003). The Bakers assert that, unlike a "custody" determination which is modifiable, an order appointing a "guardian" for a minor child becomes final and unappealable. As a result, they contend that the Hes were required to file a petition to terminate the Bakers' guardianship rights, and they were required to prove grounds for termination by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(a), -113(d) (2003) (setting forth the jurisdiction and venue of the courts in terminating parental or *guardianship rights* to a child).

The Bakers cite to no Tennessee case law, and our independent research has likewise failed to locate any authority, which requires the result they urge this Court to adopt in the present case. Moreover, requiring biological parents to seek to terminate the guardianship rights of a non-parent, as the Bakers suggest, would stand in direct contravention of a biological parent's fundamental right to the care, custody, and control of their children. *See Santosky v. Kramer*, 455 U.S. 745,753 (1982); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993). To adopt such an approach would be, in essence, to sanction *de facto* adoptions without the need of protecting the biological parents' constitutionally protected right to their minor child. This we decline to do.

children, our supreme court has instructed that, in an initial custody determination between a parent and a non-parent, the following standard must be applied to protect the biological parents' fundamental constitutional rights:

> [I]n a contest between a parent and a non-parent, a parent cannot be deprived of the custody of a child unless there has been a finding, after notice required by due process, of substantial harm to the child. Only then may a court engage in a general "best interest of the child" evaluation in making a determination of custody.

In re Adoption of Female Child, 896 S.W.2d 546,548 (Tenn. 1995). The supreme court reaffirmed this principle in *Blair v. Badenhope*, stating:

> The law is now well-settled that the Tennessee Constitution protects the fundamental right of natural parents to have the care and custody of their children. *See Nale v. Robertson*, 871 S.W.2d 674, 680 (Tenn. 1994); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993). Through Article I, section 8 and its implicit recognition of parental privacy rights, our Constitution requires that courts deciding initial custody disputes give natural parents a

> presumption of "superior parental rights" regarding the custody of their children. *See In re Askew*, 993 S.W.2d 1, 4 (Tenn. 1999). Simply stated, this presumption recognizes that "parental rights are superior to the rights of others and continue without interruption unless a biological parent consents to relinquish them, abandons his or her child, or forfeits his or her parental rights by some conduct that substantially harms the child." *See O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995).

Blair, 77 S.W.3d at 141.

In Blair, our supreme court was asked to address the standard to be applied to a biological parent's petition to *modify* a previous custody order awarding custody of the child to a non-parent. ***Blair***, 77 S.W.3d at 139. The mother of the child succumbed to cancer in 1990. Id. Prior to her death, the mother and the child were cared for by the child's grandmother. Id. After the mother's death, the child continued to live with the grandmother. *Id.* The grandmother subsequently petitioned for custody of the child, and the trial court awarded temporary custody of the child to the grandmother. *Id.* After the biological father established his paternity to the child, he contested the trial court's award of

custody to the grandmother. *Id.* However, before the trial court could reach a decision in the matter, the father and the grandmother agreed to allow the grandmother to retain custody of the child. *Id.* The trial court entered a consent order to solidify the agreement. *Id.*

Thereafter, in 1995, the father petitioned the trial court to modify the custody order, however, the court found that a material change in circumstances did not warrant a change in custody. *Id.* In 1997, the father once again petitioned the trial court for a modification of its previous custody order alleging that a material change in circumstances warranted such a change. *Id.* at 140. The father also asserted that he enjoyed a presumption that his parental rights were superior to those of the grandmother, a non-parent, therefore, the trial court could not deny him custody of his daughter unless he was shown to be an unfit parent. *Id.* The trial court, while acknowledging that the father was a fit parent, concluded that a material change in circumstances did not exist to warrant a change in custody. *Id.* This Court affirmed, and the supreme court reversed. *Id.* at 141.

At the outset, the supreme court examined the prior Tennessee cases addressing parent versus non-parent custody disputes and made the following observation:

> *Examining the principles applied in each of these cases* with respect to custody modification issues, a natural parent enjoys

> the presumption of superior rights under four circumstances: (1) when no order exists that transfers custody from the natural parent; (2) when the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent; (3) when the order transferring custody from the natural parent is invalid on its face; and (4) when the natural parent cedes only temporary and informal custody to the non-parents. *Consequently, when any of these circumstances are present in a given case, then protection of the right of natural parents to have the care and custody of their children demands that they be accorded a presumption of superior parental rights against claims of custody by non-parents.*

Id. at 143 (emphasis added). In *Blair*, the supreme court noted that it was also being asked to decide whether a "fifth circumstance" warranted the same result; "when the order transferring custody from the natural parent is valid in all respects, even though it results from the natural parent voluntarily surrendering full and [sic] custody of the child to the non-parent." *Id.*

In concluding that this "fifth circumstance" did not warrant an application of the "superior parental rights doctrine" to the father's petition in *Blair*, our supreme court stated:

> Though we have broadly recognized that the right of parental privacy in this state is fundamental, *see, e.g., Hawk*, 855 S.W.2d at 579, nothing in the language of our Constitution, nor in the volumes of our case law, suggests that the superior rights doctrine should assist a parent to obtain custody of a child when a valid court order properly transferred custody from that parent in the first instance. Nor is there any suggestion from these sources that our right to privacy extends so far as to warrant application of the superior rights doctrine even when that valid order results from the natural parent voluntarily consenting to give custody of the child to a non-parent. Because all of our prior cases discussing awards of custody to a natural parent from a non-parent have been those in which the initial transfer of custody from the natural parent was not accomplished with a valid court order or was not consensual, these cases cannot be properly used to "say what the law is" on this issue in Tennessee. *Id.* After examining similar cases from sister states, the supreme court concluded as follows:
>
> > As these cases demonstrate, parents in the initial custody proceedings enjoy a strong presumption that they are entitled to the

> physical custody of their children. However, having once protected the rights of natural parents to the care and custody of their children, no constitutional principle demands that natural parents again be afforded a presumption of superior rights in a subsequent modification proceeding. Of course, where an initial order does not exist, or is otherwise invalid, then the Constitution requires a court to apply the superior rights doctrine. However, because these circumstances do not exist in this case, we disagree that the Tennessee Constitution compels application of that doctrine in the face of a lawful and valid court order vesting custody of [the child] in her grandmother.

Id. at 146.

The supreme court then turned its attention to the effect the father's voluntary consent to relinquish custody of his daughter to the grandmother had on his ability to assert his superior parental rights in a proceeding to modify the previous custody order. *Id.* The supreme court found that the father's voluntary relinquishment of custody "undermine[d] his argument that the Constitution commands application of the superior rights doctrine in this custody modification

proceeding." *Id.* In fact, the court concluded that a "parent's voluntary transfer of custody to a non-parent, with *knowledge of the consequences of that transfer*, effectively operates as a waiver of these fundamental parental rights." *Id.* at 147 (emphasis added). In response to the arguments put forth by the dissent in Blair, the majority made the following observation:

> Importantly, the dissent maintains that "parents in many cases may make custodial decisions without fully understanding the legal ramifications of their choices." Characterizing the voluntary waiver of parental rights as a "trap for the unwary," the dissent expresses concern that parents may not fully understand the effect of such a waiver.
>
> We fully agree with the dissent in this regard, and *we emphasize here, as above, that a parent's voluntary relinquishment of custody must be made with knowledge of the consequences of that decision.* Where a natural parent voluntarily relinquishes custody without knowledge of the effect of that act, then it cannot be said that these rights were accorded the protection demanded by the Constitution. As such, application of the superior rights doctrine in a subsequent

> modification proceeding would be justified. However, no such allegation has been made by [the father] in this case.

Id. at 147-48 n.3.

Mother relies on three of the "circumstances" enumerated by our supreme court in *Blair* in support of her argument that the "superior parental rights doctrine" should apply to her petition to modify the custody order. First, she alleges that the June 4,1999 order entered by the juvenile court was accomplished by fraud or without providing notice to her. Second, Mother asserts that, through the June 4, 1999 order, she only ceded temporary and informal custody to the Bakers. Finally, she asserts that the June 4,1999 order is invalid on its face. We will address each of these arguments in turn.

1. Alleged Fraud and Lack of Notice

The chancery court concluded that "[a]ll parties, including Mr. and Mrs. He, knowingly and voluntarily signed the June 4,1999, Consent Order Awarding Custody, without being induced by any fraud or undue influence." All of the arguments put forth by Mother on appeal addressing this issue fail to demonstrate how the trial court erred in finding a lack of fraud in the inducement of the order. Moreover, Mother offers no argument regarding a lack of notice of the hearing

on the order, and she would be hard pressed to make such an argument given the fact that she agreed to an order transferring custody and appeared at juvenile court on June 4, 1999.

Instead, Mother contends that she did not receive proper legal advice and did not enter into the agreed order "with knowledge of the consequences of that transfer." Mother primarily points to the fact that, while Father attended the meeting with Mr. Weaver prior to the order being entered, she was not present at that meeting. On the day the parties met at juvenile court to sign the order, Mother, Ms. Cloud, Ms. Chunn, and Pastor Yau met in a separate room to discuss the order. Mother asserts that this meeting resulted in her receiving legal advice from non-lawyers. Based on these facts, Mother argues that she was not fully advised of her legal rights, and therefore, did not "consent" to the transfer of custody or "expressly waive" her right to a hearing.

The trial court concluded that, based on the evidence at trial, Ms. Chunn, Ms. Cloud, and Pastor Yau "fully explained the legal ramifications of both the Petition for Custody and the Consent Order Awarding Custody, both of which Mrs. He later voluntarily signed." There was conflicting testimony offered at trial on the level of Mother's understanding regarding the transfer of custody. Mother testified that she did not understand the ramifications of the order. The trial court noted that, both prior to and before June 4, 1999, the Hes engaged the services of at least three

attorneys to advise them in Mother's civil case for the alleged assault in November of 1998 and Father's criminal trial. However, the Hes never sought advice from these attorneys about the custody issue, and, in fact, never mentioned the existence of A.M.H. to any of these attorneys. Regarding the meeting with Mr. Weaver, Father denied ever calling Mother from the meeting to inquire if they should proceed in her absence. In light of the testimony of the Bakers, Mr. Weaver, and Ms. Chunn to the contrary, the trial court concluded that the call did, in fact, take place, and Mother waived her right to attend. Since Mother did not attend this meeting, Ms. Chunn took Pastor Yau with her to meet with Mother at the Hes' apartment prior to the meeting in juvenile court to sign the order. Pastor Yau testified that Ms. Chunn wanted to ensure that Mother understood the custody arrangement, and Mother indicated that she understood the order and the process. Regarding the meeting in juvenile court on June 4,1999, both Pastor Yau and Ms. Chunn testified that Mother indicated that she understood the order and the process.

The trial court's findings in relation to this issue are based solely upon the credibility of the witnesses. The record does not contain clear and convincing evidence that Mother lacked knowledge as to the consequences of the transfer of custody. ***See Wells v. Tenn. Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999). Accordingly, we must conclude that Mother's attempts to argue that the "superior parental rights doctrine" should apply for the above stated reasons must fail.

2. Temporary Custody

While Mother had "knowledge of the consequences" of the transfer of custody, she contends that her "knowledge" consisted of the understanding that the agreed order only transferred temporary custody of A.M.H. to the Bakers. Mother argues that, pursuant to the June 4,1999 order, she only intended to cede temporary custody of A.M.H. to the Bakers, therefore, she is entitled to assert her superior parental rights in her petition to modify custody. In support of this position, Mother relies on this Court's decision in *Means v. Ashby*, 130 S.W.3d 48 (Tenn. Ct. App. 2003). in *Means*, the biological mother met her brother and sister-in-law at their attorney's office to sign a custody agreement transferring custody of the mother's child to the brother and sister-in-law. *Means*, 130 S.W.3d at 52-53. Mother subsequently sought a return of custody, and the brother and sister-in-law filed a petition for adoption and to terminate the mother's parental rights. *Id.* at 53. The trial court concluded that the mother did not abandon the child by willfully failing to visit or willfully failing to support her. *Id.* However, the trial court ruled that the child should remain in the custody of the brother and sister-in-law. Id. at 53-54. Regarding the trial court's custody determination; this Court, addressing the *Blair* exception relied upon by Mother in the instant case, vacated the trial court's custody determination and remanded the case to the trial court for further consideration in light of the supreme court's decision in *Blair*. *Id.* at 58. Li support of our decision,

we noted the testimony of the attorney who drafted the order to the effect that "the primary purpose [of the custody agreement] was to allow the minor child to be covered by insurance." *Id.*

In support of her argument that she only intended to cede temporary custody of A.M.H. to the Bakers, Mother relies on the following testimony by Ms. Cloud who drafted the June 4,1999 order:

> Q. All right, and did either Mr. or Mrs. He tell you that they wanted the Bakers to take care of their child on a permanent basis?
>
> A. No.
>
> Q. Did the Hes ever say anything to you that indicated to you that they were interested in either a temporary or permanent arrangement?
>
> A. Temporary.
>
> Q. Can you tell us what you recall?
>
> A. I recall mainly talking to Casey, that she was very concerned that it was not a permanent situation. She did not want it to be a permanent situation.
>
> Q. She made that very clear to you?
>
> A. Yes, sir.

Q. When Mr. and Mrs. Baker and Mr. and Mrs. He were before you on June 4th of 1999, did they appear to be in agreement?

A. Yes.

Q. It did not appear to be a contested matter. Is that correct?

A. No.

Q. You understood Ms. He, through the interpreter, to wanting this matter to be temporary only. Is that your understanding?

A. Yes.

Q. Was there any equivocation about that, any language problem about that?

A. Not -

Q. I mean, you understood through the interpreter what she wanted?

A. I believe I did.

Q. And is that what you understood that Mr. and Mrs. Baker wanted?

A. Yes.

Q. If you understood that Mr. and Mrs. Baker wanted language in the consent order that said that, "We will be able to raise this child until she's 18 years of age," would you consider that to be

consistent with what Ms. He understood on that day?

A. No.

Q. Ms. Cloud, what was the agreement that you were so sure that all parties had consented to? Was it temporary or permanent?

A. Temporary.

Q. Temporary because it could be changed; right?

A. That would be one of the reasons, but I believe Casey was fairly adamant that at some point she wanted her child back.

Regarding the meeting with Mother at juvenile court on June 4, 1999, Pastor Yau offered the following testimony:

Q. Did you hear any discussion about insurance?

A. Yes.

Q. And what was said about insurance?

A. No detail was mentioned, but because of the need of medical care for the baby, the guardians or the custodians needs to have medical insurance for the baby.

Q. And were you asked to explain that to Ms. He?

A. Yes.

Q. And did you?

A. Yes.

Q. Did you explain anything about the word "temporary" to Ms. He?

A. Yes, I did.

Q. And what did you tell her about that?

A. I told her that temporary custody means that someone was willing to look after or take care of the well-being of the baby for a period of time.

Q. For how long?

A. No specific time was mentioned.

Q. And what specifically - based on that, what specifically did you explain to Ms. He?

A. In summary - you know, I can't recall the word for word question - said that because the Hes were unable to financially support the baby at that time, that some family was willing to take care of their baby on their behalf, but because of the legal procedure that necessitate to buy insurance or to

administer medication or whatever to the baby by the custodian, Ms. He needs to give the authority to the custodian by signing a document.

Q. Did you hear the word "temporary" in that meeting?

A. Yes.

Q. And were you asked to explain what the word "temporary" meant for the benefit of Ms. He?

A. "Temporary" means a period of time against permanent?

The trial court found both Ms. Cloud and Pastor Yau to be credible witnesses.

While it is true that our supreme court stated in ***Blair*** that the "superior parental rights doctrine" will apply "when the natural parent cedes only temporary and informal custody," we believe Mother has misconstrued this exception. The four "circumstances" enunciated in ***Blair*** which the supreme court held would warrant application of the "superior parental rights doctrine" to a modification proceeding were the result of the court's analysis of previous cases addressing parent versus non-parent custody disputes. ***Blair***, 11 S.W.3d at 143. It is apparent that the supreme court derived the "temporary and informal custody" exception from its prior

decision in *In re Askew*, 993 S.W.2d 1 (Tenn. 1999). In that case, the biological mother was experiencing financial difficulties at the time of giving birth to her daughter. *In re Askew*, 993 S.W.2d at 1. As a result, the mother and the child began to reside with one of the mother's female friends. *Id.* In 1994, the non-parent female petitioned the juvenile court for custody of the child, simply stating in her petition that the child had lived with her since 1991. *Id.* at 2. Thereafter, the juvenile court granted the petition and awarded custody to the non-parent female in a perfunctory order which made no findings regarding the mother's unfitness as a parent. *Id.* The mother subsequently filed for a return of custody citing a change in circumstances and asked that the juvenile court's order be set aside because she did not receive notice of the prior hearing. *Id.* The juvenile court determined that the 1994 order should be set aside because the mother was not given proper notice, but the court awarded "temporary custody" to the non-parent female. *Id.* It its order, the juvenile court stated that, while the mother's interest in her child was superior to that of the non-parent female, the mother had to demonstrate that she was presently able to care for the child before the court would return custody to her. *Id.* The mother subsequently filed a renewed petition to regain custody which the juvenile court denied. *Id.*

The mother filed an appeal to the circuit court, but the circuit court concluded that the mother failed to carry her burden of proving a change in circumstances warranting a

change in custody. *Id.* at 3. On appeal, this Court noted that, since the mother did not appeal the 1994 order, the *res judicata* effect of the order made it final. Id. The supreme court disagreed, stating:

> In addition, we are also troubled by the Court of Appeals' analysis of the *res judicata* effect of this August 1994 order. The order conveys no *suggestion of finality* but, instead, characterizes the custody award as "temporary," stating that "the Court is only delaying restoring custody to the natural parents," and emphasizing that the rights of the natural parents are superior to the interest of [the non-parent female]. We would characterize this order as a continuance of the case until the court heard more proof from [the mother]. Under these circumstances, [the mother] had virtually *no incentive to appeal* what was not a final order, since the juvenile court explicitly indicated that [the child] would soon be returned to the custody of her natural parents.

Id. at 4. Thus, when discussing the "temporary" nature of the order in *In re Askew*, our supreme court was concerned with the order's lack of finality.[23]

In the instant case, Mother seeks to argue that the supreme court's reference to "temporary and informal custody" in *Blair* is addressed to the *length* of the custody arrangement set forth in the order. However, this language simply reflected the supreme court's interpretation of then existing precedent. It is clear from the supreme court's discussion in *In re Askew* that the court's interest is in the effect of the order itself (i.e., its finality) as opposed to the length of the custody arrangement. There is nothing in the juvenile court's June 4,1999 order which signifies a lack of finality. Stated differently, there is no indication in the order that the juvenile court intended to hold the change in custody in abeyance until Mother met certain requirements.

Orders transferring custody of a minor child to another parent or a non-parent are, by their very nature, "temporary"

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[23] Ordinarily," [c]ustody orders are *res judicata* and cannot be modified unless there has been a material change in circumstances that makes a change of custody in the child's best interest." *In re E.J.M.*, No. W2003-02603-COA-R3-JV, 2005 Tenn. App. LEXIS 146, at *46 (Tenn. Ct. App. Mar. 10, 2005) (no perm. app. filed) (citing *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); ***Blair,*** 11 S.W.3d at 148)); see ***also Rushing v. Rushing***, No. W2003-01413-COA-R3-CV, 2004 Tenn. App. LEXIS 708, at *14 (Tenn. Ct. App. Oct. 27, 2004) (no perm. app. filed).

(*i. e.*, as defined by Mother to mean subject to being changed at a later date). The parent relinquishing custody is always free to petition the court to change a prior custody arrangement when circumstances warrant. ***See*** Tenn. Code Ann. § 36-6-101(a)(l) (2003) ("Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case may require."); ***see also Kendrick v. Shoemake***, 90 S.W.3d 566, 570 (Tenn. 2002) (discussing the standard to apply to a petition to modify a valid order of custody). To hold, as Mother suggests, that the supreme court intended the word "temporary" in *Blair* to refer to "the length of the custody arrangement" would relegate the courts of this state into a perpetual state of defining the meaning of "temporary" as it pertains to custody decisions. In fact, the Hes acknowledge the absurdity of such a result in their brief filed on appeal. In their brief, the Hes assert that "there is no evidence that the parties understood the technical definition of 'temporary,' in the same manner that a lawyer would understand that Tenn." The Hes go on to conclude that the concept of "permanent" custody orders is, in reality, a misnomer since permanent orders of custody actually take the form of adoption proceedings. Thus, if we were to adopt Mother's logic, we would need to engage in an evaluation of the biological parent's subjective understanding of the concept of "temporary" custody each and every time we were asked to evaluate whether the natural parent intended to

cede "only temporary and informal custody" to the non-parent. ***See Blair***, 11 S.W.3d at 143.

It is apparent that the supreme court's discussion of the "temporary" nature of the order in *In re Askew* was aimed at addressing the mother's failure to appeal that order, and not the "length of the custody" ordered. *See In re Askew*, 993 S.W.2d at 4-5. The primary import of the court's analysis in *In re Askew* focused on the juvenile court's failure to recognize the biological parent's superior rights to her minor child when deciding the initial custody issue. *See id.* at 5. Accordingly, we interpret our supreme court's decisions in *Blair* and *In re Askew* to mean that, when a trial court enters an order which is temporary (*z. e.*, the court has not entered a definitive and unalterable ruling on the custody of the child), and the court has not previously permitted the biological parent to assert her superior parental rights, the superior parental rights doctrine may be asserted by the biological parent in a subsequent modification proceeding.

We are cognizant of Mother's reliance on our decision in *Means* in support of her position on appeal. However, *Means* was decided after the decision in *In re Askew* but before the decision in *Blair*. *Means*, 130 S.W.3d at 57. Moreover, while we noted the lawyer's testimony regarding the "primary purpose" for the custody order at issue in *Means*, we did not reach a decision on the merits as to the correctness of the trial court's custody decision. *Id.* at 58. Instead, we remanded the case to the trial court for further consideration

in light of the supreme court's decisions in *Blair* and *In re Askew. Id.* Accordingly, we are of the conclusion that this Court's holding in *Means* does not support the proposition urged upon this Court by Mother.

Regardless of whether Mother believed the June 4,1999 order was "temporary" (*I. e.*, custody of short duration), it is clear from the face of the order and the surrounding facts that all of the parties intended for the order to transfer custody of A.M.H. from the Hes to the Bakers, and it was to remain effective until such time as the Hes sought to file a petition to regain custody. Mr. Weaver testified that he informed Father at their meeting on June 2,1999 that the Hes would need to file a petition to modify the custody order if they wanted a return of custody in the future. Ms. Cloud testified that she advised the Hes that, if they desired to change the custody arrangement in the future, they would need to petition the court to modify the custody order. Based on this testimony, the trial court concluded that Mother understood the need to file a petition to modify the custody order in the future, and we find nothing in the record to warrant a different conclusion. Accordingly, we find that Mother's argument in this regard is without merit.

3. Validity of the June 4,1999 Custody Order

On appeal, Mother asserts that she was entitled to assert her superior parental rights in the trial court because the June 4,1999 custody order is invalid on its face. *See* ***Blair***, 77

S.W.3d at 143. Specifically, Mother asserts that the juvenile court's custody order fails to comply with certain provisions found in Title 34, Chapter 1, Part 1 of the Tennessee Code. First, Mother argues that the trial court did not conduct an open-court hearing to consider any additional person who would be better suited to act as guardians of A.M.H. *See* Tenn. Code Ann. § 34-2-103 (2003). Next, Mother asserts that the juvenile court's order fails to comply with the following statutory provision:

> The petition for the appointment of a guardian, which shall be sworn, should contain the following:
>
> (3) The name, age, mailing address and relationship of the proposed guardian and, if the proposed guardian is other than the petitioner, a statement signed by the proposed guardian acknowledging awareness of the petition and willingness to serve;
>
> (5) An explanation of the reason for seeking appointment of a guardian[.]

Tenn. Code Ann. § 34-2-104 (2003). Mother notes that, while the Hes original petition for custody mentions the Bakers and

lists their address, it only mentions them in regards to a transfer of custody, not guardianship. Furthermore, the petition does not explain the reason for seeking the appointment of a guardian. Finally, Mother argues that, "[i]f the court determines a guardian is needed, the court shall enter an order which shall... [s]tate any other authority or direction as the court determines is appropriate to properly care for the person and property of the minor." Tenn. Code Ann. § 34-2-105(3) (2003).

At trial, Ms. Cloud, the individual who drafted the petition and resulting custody order, testified that she made the decision to include the guardianship language in the June 4,1999 custody order based upon her conversations with the parties. It is apparent to this Court that, in arguing her position on appeal regarding this issue, Mother has placed form over substance. We need not decide whether the juvenile court entered the original custody order in compliance with the above cited statutes relied upon by Mother on appeal.

As we noted previously, the enunciation of this "circumstance" in *Blair* resulted from the supreme court's evaluation of its prior decisions addressing custody disputes between the natural parents and non-parent individuals. ***Blair***, 77 S.W.3d at 143. Once again, we turn to the supreme court's decision in *In re Askew* as the source of this "circumstance" warranting the application of the "superior parental rights doctrine" to a petition to modify a prior custody order.

Regarding the invalidity of the initial custody order, the supreme court held as follows:

> It appears that *no valid initial determination was ever made that [the mother's] custody of [the child] would result in "substantial harm " to the child.* Absent such a finding, we conclude that the deprivation of the custody of her child has resulted in an abridgment of [the mother's] fundamental right to privacy. *Bond*, 896 S.W.2d at 548; *Nale*, 871 S.W.2d at 680; *Hawk*, 855 S.W.2d at 577. *In light of the unique circumstances of this case*, we believe that the Court of Appeals has misapplied modification of custody principles when no valid initial order depriving the natural mother of custody existed. *In the absence of such a valid initial order, we believe that it would be unconstitutional for the natural mother to bear the burden of proving the absence of substantial harm.* Because the record does not show that a finding of substantial harm was made in this case, constitutional principles compel us to reverse the decisions of the lower courts.

In re Askew, 993 S.W.2d at 5. Thus, in *In re Askew*, the supreme court, when speaking of the original custody order's

"invalidity," was concerned with whether the natural parent's constitutional rights were protected in the initial custody hearing (*i.e.*, the lack of a finding of substantial harm to the child). We decline to extend this "circumstance" beyond the import of the supreme court's discussion regarding the invalidity of the initial order *in In re Askew* to include the facts in the present case.[24]

The trial court determined that, based upon the testimony of the witnesses at trial, that Mother was fully advised of the meaning of the June 4,1999 consent order. As previously noted, we find no justification for disturbing this credibility determination on appeal. The record demonstrates that the parties, including Mother, understood this order to transfer temporary custody of A.M.H. from the Hes to the Bakers. Furthermore, the record demonstrates that Mother was informed that she would need to file a petition with the court to regain custody of A.M.H. at a future date. Armed with this knowledge, Mother voluntarily consented to the entry of the order and waived a hearing on the custody issue. The custody order does not have the indicia of a lack of finality as discussed by our supreme court in *In re Askew*. Accordingly, none of the "circumstances" set forth by our

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[24] Furthermore, Mother's attempts to attack the validity of the June 4,1999 custody order in this regard amount to an attempt to avoid the consequences of her failure to appeal that order to this Court.

supreme court in *Blair* warrant the application of the "superior parental rights doctrine" to Mother's petition to modify custody in this case, therefore, we are bound by the following statement by our supreme court in *Blair*.

> [P]arents in the initial custody proceedings enjoy a strong presumption that they are entitled to the physical custody of their children. However, having once protected the rights of natural parents to the care and custody of their children, no constitutional principle demands that natural parents again be afforded a presumption of superior rights in a subsequent modification proceeding. Of course, where an initial order does not exist, or is otherwise invalid, then the Constitution requires a court to apply the superior rights doctrine. However, because these circumstances do not exist in this case, we disagree that the Tennessee Constitution compels application of that doctrine in the face of a lawful and valid court order vesting custody of [the child] in her grandmother.
>
> Based on our prior case law interpreting Article I, section 8 in this context, and given the overwhelming authority from

> other jurisdictions on this issue, we conclude that our Constitution does not accord natural parents a presumption of superior rights to modify an existing and valid order of custody, even when that order results from the parent voluntarily agreeing to give custody to the non-parent. Though strong in many respects, no aspect of the fundamental right of parental privacy is absolute, and a parent who is given the opportunity to rely upon the presumption of superior rights in an initial custody determination may not again invoke that doctrine to modify a valid custody order. Absent proof of the custody order's invalidity or proof that the parental rights were not protected in the initial custody proceeding, the child's interest in a stable and secure environment is at least as important, and probably more so, than the parent's interest in having custody of the child returned.

Blair, 11 S.W.3d at 146-48. We conclude that the trial court did not err by refusing to apply the "superior parental rights doctrine" to Mother's petition to modify the June 4, 1999 custody order.

F. Grounds for Termination

1. Application of the "Settled Purpose Doctrine'

At the outset, we note that the Bakers filed their petition to terminate the Hes' parental rights on June 20,2001. The applicable statute in effect on the date the Bakers filed their petition provided that "[abandonment by the parent or guardian, as defined in § 36-1-102," qualifies as a ground for terminating the biological parent's parental rights. Tenn. Code Ann. § 36-1-113(g)(l) (2001). At issue in this case is the definition of abandonment set forth in section 36-1-102 of the Tennessee Code. Since the petition at issue was filed in 2001, we must evaluate this case under the adoption statutes in effect at that time. ***See In re Swanson***, 2 S.W.3d 180, 185 (Tenn. 1999).

In its memorandum opinion, the trial court, perhaps out of an abundance of caution, concluded as follows:

> Although the "settled purpose doctrine" was repealed legislatively in 1996 and no longer has any force or effect as law in Tennessee, a review of the evidence in this cause establishes that the actions of the Hes evince a settled purpose to forego all parental rights and responsibilities.

Prior to 1995, the courts of this state utilized a judicially created standard to evaluate whether a biological parent abandoned his or her child in adoption cases. ***In re Swanson***, 2 S.W.3d at 184; ***O'Daniel v. Messier***, 905 S.W.2d 182, 186 n.3 (Tenn. Ct. App. 1995). This Court set forth the judicially created standard to be applied in adoption cases by stating:

> So, the issue of abandonment should be resolved by the Circuit Court under the following statement of the law:
>
> "Abandonment imports any conduct on the part of the parent which evinces *a settled purpose to forego all parental duties and relinquish all parental claims to the child.* It does not follow that the purpose may not be repented of, and, in proper cases all parental rights again acquired. * * * but when abandonment is shown to have existed, it becomes a judicial question whether it really has been terminated, or can be, consistently with the welfare of the child." 1 Am. Jur. Adoption of Children, Section 42.

Exparte Wolfenden, 349 S.W.2d 713,714 (Tenn. Ct. App. 1959) (emphasis added); *see* ***also In re Adoption of Self***, 836 S.W.2d 581, 582-83 (Tenn. Ct. App. 1992); ***Fancher v.***

Mann, 432 S.W.2d 63,65-66 (Tenn. Ct. App. 1968). In 1982, the Tennessee Supreme Court, relying on our decision in *Ex Parte Wolfenden*, reaffirmed that the "settled purpose doctrine" remained the standard applicable to a determination of abandonment in adoption cases. ***In re Adoption of Bowling***, 631 S.W.2d 3 86, 389 (Tenn. 1982).

In 1995, this Court noted in *O'Daniel* that Tennessee lacked a uniform standard for ascertaining whether a biological parent had abandoned his or her child. ***O'Daniel***, 905 S.W.2d at 186. At the time we decided *O'Daniel*, the courts of this state applied one of three possible standards to determine abandonment according to the type of proceeding involved. *Id.* at 186 n.3. At the same time we were deciding *O 'Daniel*, the Tennessee General Assembly was undertaking an effort to rewrite the then existing adoption laws. ***See*** 1995 Tenn. Pub. Acts ch. 532; ***O'Daniel***, 905 S. W.2d at 187 n.5. However, since the proposed legislation was pending at the time of our decision in *O 'Daniel*, we were forced to evaluate whether the mother in that case abandoned her daughter under the existing legal framework (i.e., the "settled purpose doctrine") applicable to adoption proceedings. ***O'Daniel***, 905 S.W.2d at 187 (citing/n ***re Adoption of Bowling***, 631 S:W.2dat 389). In evaluating the line of cases establishing the "settled purpose doctrine" in this state up to that point in time, we made the following observation:

> These decisions demonstrate that the courts consider the following matters when determining whether an abandonment has occurred: (1) the parent's ability to support the child; (2) the amount of support the parent has provided to the child; (3) the extent and nature of the contact between the parent and the child; (4) the frequency of gifts on special occasions; (5) whether the parent voluntarily relinquished custody of the child; (6) the length of time the child has been separated from the parent; and (7) the home environment and conduct of the parent prior to the removal of the child. *See In re Rigsby*, *supra*, slip op. at 10; *Koivu v. Irwin*, 721 S.W.2d at 807. No single factor is controlling. Abandonment inquiries are heavily fact-oriented, so the courts may consider any fact that assists in deciding whether the parent's conduct demonstrates a conscious or willful disregard of all of his or her parental duties. *In re Rigsby*, *supra*, slip op. at 10.

Id. at 187. It is this judicially created legal framework which Appellants urge this Court to apply to the present case.

The Tennessee General Assembly's efforts in 1995 to amend the adoption statutes resulted in the creation of a

statutory definition of abandonment applicable to adoption cases. *See* 1995 Tenn. Pub. Acts ch. 532, § 1. This definition, which remained in effect when the Bakers filed their petition in the instant case, provided, in relevant part, as follows:

> (1) (A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child;
>
> (B) For purposes of this subdivision (1), "token support" means that the support, under the circumstances of the individual case, is insignificant given the parent's means;

(C) For purposes of this subdivision (1), "token visitation" means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child;

(D) For purposes of this subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means that, *./or a period of four (4) consecutive months, no monetary support was paid or that the amount of support paid is token support;*

(E) For purposes of this subdivision (1), "willfully failed to visit"means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation;

(F) Abandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to

terminate parental or guardianship rights or seeking the adoption of a child; and

(G) *"Abandonment" and "abandonment of an infant" do not have any other definition except that which is set forth in this section, it being the intent of the general assembly to establish the only grounds for abandonment by statutory definition. Specifically, it shall not be required that a parent be shown to have evinced a settled purpose to forego all parental rights and responsibilities in order for a determination of abandonment to be made. Decisions of any court to the contrary are hereby legislatively overruled^.]*

Tenn. Code Ann. § 36-1-102(1) (2001) (emphasis added).

The Tennessee Supreme Court was ultimately called upon to evaluate the constitutionality of this definition, specifically subsection (D) defining "willfully failed to support." ***In/n re Swanson***, 2 S.W.3d 180, 182 (Tenn. 1999), the biological father of a minor child appealed this Court's determination that he abandoned his child pursuant to the statutory definition of abandonment. At the outset, the supreme court set forth the aforementioned legal framework which established the "settled purpose doctrine" and led the

legislature to amend the adoption statutes in 1995. *Id.* at 184-85. On appeal, the father argued that the statutory definition of "willfully failed to support" was unconstitutional because it did not contain a provision requiring that the parent's failure to pay support to be intentional. *Id.* at 185-86. He asserted that, since the statutory definition created a conclusive presumption that failure to provide support would result in a termination of parental rights, the statute failed to comport with his fundamental constitutional right to the care, custody, and control of his child. *Id.* at 186. The supreme court agreed.

In determining that the definition of "willful failure to support" was unconstitutional, the supreme court noted that the previous definition of abandonment pertaining to failure to support "always contained an element of intent or purposefulness." *Id.* at 187. It was clear to the supreme court that, by enacting the statutory definition of abandonment, the legislature "intended to limit the discretion of trial judges when making a determination as to whether abandonment has occurred." *Id.* at 186. Thus, the supreme court held as follows:

> Since the statutory definitions of "willfully failed to support" and "willfully failed to make reasonable payment toward such child's support" in effect create an irrebuttable presumption that the failure to provide

> monetary support for the four months preceding the petition to terminate parental rights constitutes abandonment, irrespective of whether that failure was intentional, we hold that those definitions are unconstitutional. The statutory definitions simply do not allow for the type of individualized decision- making which must take place when a fundamental constitutional right is at stake. Therefore, they impermissibly infringe upon a parent's right to the care and custody of his or her children.
>
> The federal and state constitutions require the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away. *Stanley*, 405 U.S. at 658-59; *Bond*, 896 S.W.2d at 548.

Id. at 188. The court went on to hold that "we are able to elide the unconstitutional portion of the statute, and the remaining provisions of the Act may be enforced." *Id.* Accordingly, the supreme court instructed that "the definition in effect under

prior law shall be applied" until the legislature chooses to amend the statute,[25] stating:

> We wish to make it clear that the definition previously in effect was the definition as it existed in 1994. Under the prior statute, the definition of "abandoned child"[26] contained an

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[25] The legislature did not choose to act to amend the statute until 2003. Effective June 2,2003, the statute was amended to include the following language:

(D) For purposes of this subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means the *willful* failure, for a period of four (4) consecutive months, to provide monetary support or the *willful* failure to provide more than token payments toward the support of the child[.]

Tenn. Code Ann. § 36-1-102(1)(D) (Supp. 2004) (emphasis added); 2003 Tenn. Pub. Acts ch. 231, § 3. Since this amendment was not in effect at the time the Bakers filed their petition to terminate the Hes' parental rights, it is inapplicable to the present appeal. ***See In re Swanson*, 2 S. W.3d at 185**; ***O'Daniel v. Messier***, 905 S. W.2d **182,187 n.5** (Tenn. Ct. App. 1995).

[26] Under the definition in effect prior to 1995, an "abandoned child" was defined as:

element of intent both in failures to visit and failures to support.

Id. at 189 n. 14.

Despite the supreme court's holding in *In re Swanson*, the Hes argue on appeal that the trial court erred by holding that the "settle purpose doctrine" no longer has the force of law in Tennessee. According to the Hes, the "settled purpose doctrine" remains a viable legal doctrine, and the trial court should have utilized the doctrine to ascertain whether the Hes abandoned A.M.H. Moreover, the Hes assert that, since the "settled purpose doctrine" applies in this case, the trial court erred in finding that the Hes' actions evinced a "settled purpose to forego all parental rights and responsibilities."[27] Conversely, the Bakers assert that the trial court correctly

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(i) A child whose parents have *willfully* failed to visit or have *willfully* failed to support or make reasonable payments towards such child's support for four (4) consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child ....

Tenn. Code Ann. § 36-1-102(1)(A) (1994) (emphasis added); *see also* 1978 Tenn. Pub. Acts ch. 704, § 1.

[27] The Hes' position on appeal regarding this issue is, in essence, the same argument espoused by Amici in their brief.

observed that the "settled purpose doctrine" has been legislatively repealed and has no continued viability in Tennessee law. In the alternative, the Bakers assert that, if the doctrine is held to apply to this case, the facts in the record support the trial court's finding that the Hes had a settled purpose to forego all of their parental rights and responsibilities regarding A.M.H. We cannot agree with the position urged upon this Court by the Appellants.

In *In re Swanson*, the supreme court, while noting the history leading to the creation of the judicially created "settled purpose doctrine," did not direct the court's of this state to utilize the doctrine in lieu of the unconstitutional provision in the 1995 statute. Instead, the court expressly directed that the statutory definition of "abandoned child" would remain in effect until the legislature acted to amend the constitutionally defective statute. *Id.* at 189 n.14. Second, our supreme court was careful to note that *only* the definition of "willful failure to support" in the 1995 statutory amendment was unconstitutional, leaving the remainder of the statute in force. *Id.* at 188. Of particular significance is the fact that the following language from section 36-1-102 of the Tennessee Code, which was in effect when he Bakers filed their petition in this case, remained applicable to proceedings of this nature after the supreme court's decision in *In re Swanson*:

> (G) "Abandonment" and "abandonment of an infant" do not have any other definition except

> that which is set forth in this section, it being the intent of the general assembly to establish the only grounds for abandonment by statutory definition. *Specifically, it shall not be required that a parent be shown to have evinced a settled purpose to forego all parental rights and responsibilities in order for a determination of abandonment to be made. Decisions of any court to the contrary are hereby legislatively overruled^.]*

Tenn. Code Ann. § 36-1-102(1)(G) (2001) (emphasis added); *see also In re Swanson*, 2 S.W.3d at 188-89. Accordingly, we must conclude that reference to the "settled purpose doctrine" is no longer appropriate given the 1995 amendments to section 36-1-102(1) of the Tennessee Code and our supreme court's decision in *In re Swanson*.[28]

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[28] The Hes and the Amici direct our attention to cases decided by this Court after the supreme court's ruling in *In re Swanson* and addressing petitions filed prior to the 2003 amendments to the statute at issue, wherein reference is made to the applicability of the "settled purpose doctrine" in deciding issues related to abandonment. *See* ***State v. R.S.***, No. M2002-00919-COA-R3-CV, 2003 Tenn. App. LEXIS 657, at *25 (Tenn. Ct. App. Sept. 11, 2003); ***Dep't of Children's Services v. C.L.***, No. M2001-02729-COA-R3-JV, 2003 Tenn. App. LEXIS 606, at *50-51 (Tenn. Ct. App. Aug. 29,2003) (no perm. app. filed); ***State v. Demarr***, No. M2002-

To some extent, of course, the meaning of a "settled purpose" overlaps with and is subsumed within the statutory definition of willfulness in effect when the Bakers filed their petition to terminate the Hes' parental rights. However, to the extent that the "settled purpose doctrine"extends beyond

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02603-COA-R3-JV, 2003 Tenn. App. LEXIS 569, at *27 (Tenn. Ct. App. Aug. 13,2003) (no perm. app. filed); *Spencer v. Aydlotte*, No. W2001-00995-COA-R3-CV, 2001 Tenn. App. LEXIS 957, at *9 (Tenn. Ct. App. Dec. 28, 2001) (no perm. app. filed); ***Martin v. Martin***, No. M1999-00210-COA-R3-CV, 2000 Tenn. App. LEXIS 178, at *2-3 (Tenn. Ct. App. Mar. 23, 2000) (no perm. app. filed). However, in other cases dealing with petitions filed after *In re Swanson* but before the 2003 amendments to the statute at issue, this Court did not refer to the "settled purpose doctrine" but simply determined whether the biological parent's conduct was willful. ***See In re Adoption of SM.F.***, No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826, at *24 (Tenn. Ct. App. Dec. 6,2004) (no perm. app. filed); *In re S.M.*, 149 S.W.3d 632,641^12 (Tenn. Ct. App. 2004);*/n re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 Tenn. App. LEXIS 831, at *13-14 (Tenn. Ct. App. Nov. 25, 2003) (no perm. app. filed); *In re L.J.C.*, 124 S.W.3d 609, 620-21 (Tenn. Ct. App. 2003); ***In re Adoption of Copeland***, 43 S. W.3d 483,488 (Tenn. Ct. App. 2000). Regardless of any confusion which may have resulted from these earlier cases, our supreme court's opinion in *In re Swanson* makes clear that the legislature abrogated the "settled purpose doctrine," and the supreme court instructed that parties seeking to terminate a biological parent's parental rights thereafter must prove that the parent "willfully" failed to support the child.

the definition of abandonment set forth in the statute at issue, the statutory definition must be the standard applied by this Court to the present case. Consequently, we must conclude that reference to the "settled purpose doctrine" is no longer appropriate given the 1995 legislative amendments to the statutes governing termination of parental rights. Thus, the proper inquiry for this Court is whether the Hes' conduct, by failing to visit or failing to support A.M.H. during the four months immediately preceding the Bakers' petition, was "willful." *See* Tenn. Code Ann. § 36-1-102(l)(E) (2001) (defining willful failure to visit as "the *willful* failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation"); ***In re Swanson***, 2 S.W.3d at 189 n. 14 (noting that the prior definition of "abandoned child" required that the biological parent's conduct in failing to support the child be *willful*).

In determining whether a parent's conduct was "willful," the legislature has confined the courts of this state to a particular period of time. The statute in effect on the date that the Bakers filed their petition to terminate the Hes' parental rights defined abandonment, in relevant part, as follows:

> For a period of four (4) *consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s)* ... of the child

> who is the subject of the petition for termination of parental rights or adoption, that the parent(s)... either have willfully failed to visit or have willfully failed to support or make reasonable payments toward the support of the child[.]

Tenn. Code Ann. § 36-1-1-102(1)(A)(I) (2001) (emphasis added). This Court has previously noted the significance of this legislatively created time period, stating:

> Finally, we note that the trial court, in deciding whether J.M.S. abandoned S.M.F., did not confine itself to consideration of his conduct during the four-month periods immediately preceding the filing of the petition for adoption and termination and S.M.F.'s birth. In doing so, the trial court deviated from the statutory definition of "abandonment" contained in Tenn. Code Ann. § 36-1-102(1)(A)(I) and (iii). In Tennessee, the grounds for terminating parental rights are governed solely by statute, and Tenn. Code Ann. § 36-1-102(1)(G) specifically provides that "abandonment" does "not have any other definition except that which is set forth in this section, it being the intent of the general

> assembly to establish the only grounds for abandonment by statutory definition." Thus, the trial court erred to the extent that it based its decision regarding abandonment on J.M.S.'s conduct occurring after the conclusion of the statutory four-month periods.

In re Adoption of S.M.F.,No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826, at *30-31 (Tenn. Ct. App. Dec. 6,2004) (no perm. app. filed); ***see also In re Muir,*** No. M2002-02963-COA-R3-CV, 2003 Tenn. App. LEXIS 831, at * 19 (Tenn. Ct. App. Nov. 25,2003) (no perm. app. filed) (noting that the "pivotal question" when evaluating the willful failure to visit or support is the conduct of the biological parent within the four months preceding the filing of the petition to terminate). The Bakers filed their petition to terminate the Hes' parental rights on June 20, 2001, therefore, we must necessarily direct our attention to the conduct of the Hes within the four months immediately preceding that date. ***See In re D.L.B., U&*** S.W.3d 360,366 (Tenn. 2003) ("[W]e hold that only a parent's conduct in the four months immediately preceding the filing of a petition then before the court may be used as grounds to terminate parental rights under Tennessee Code Annotated section 36-l-102(l)(A)(i).").

This Court has previously addressed the concept of "willfulness" as it relates to the abandonment ground for terminating a biological parent's parental rights, stating:

> The concept of "willfulness" is at the core of the statutory definition of abandonment. For the purpose of Tenn. Code Ann. § 36-1-102(1)(A)(i), a parent cannot be found to have abandoned a child unless the parent either has "willfully" failed to engage in more than token visitation or has "willfully" failed to provide more than token monetary support to the child for four consecutive months. "Willfully" is a word of many meanings, and so each use of the word must be interpreted with reference to the statutory context in which it appears. *United States v. Sanchez-Corcino*, 85 F.3d 549, 552-53 (11th Cir. 1996); GEORGE W. PATON, A TEXTBOOK ON JURISPRUDENCE 313 n.2 (4th ed. 1972) (suggesting that use of the word should be avoided because of its ambiguities).
>
> "Willfulness" does not require the same standard of culpability required by the penal code. *G.T. v. Adoption of A.E.T.*, 725 So. 2d 404, 409 (Fla. Dist. Ct. App. 1999). Nor does it require malevolence or ill will. *In*

re Adoption of a Minor, 343 Mass. 292, 178 N.E.2d 264,267 (Mass. 1961). Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir. 1997); *United States v. Phillips*, 19F.3d 1565,1576 (11th Cir. 1994); *In re Adoption of Earhart*, 111 Ohio App. 73, 190 N.E.2d 468, 470 (Ohio Ct. App. 1961); *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89,96 (Idaho 1979). Conduct is "willful" if it is the product of free will rather than coercion. Thus, a person acts "willfully" if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing.

The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. *American Cable Corp. v. ACI Mgt., Inc.*, 2000 Tenn. App. LEXIS 615, No. M1997-00280-COA-R3- CV, 2000 WL 1291265, at *4 (Tenn. Ct. App. Sept. 14,2000) (No Tenn. R. App. P. 11 application filed). Accordingly, triers-of-fact must infer intent

> from the circumstantial evidence, including a person's actions or conduct. *See Johnson City v. Wolfe*, 103 Tenn. 277, 282, 52 S.W. 991, 992 (1899); *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992); *State v. Washington*, 658 S.W.2d 144,146 (Tenn. Crim. App. 1983); *see also In re K.L.C.*, 9 S.W.3d 768, 773 (Mo. Ct. App. 2000). A person's demeanor and credibility as a witness also play an important role in determining intent. Accordingly, trial courts are best suited for making willfulness determinations. *In re D.L.B.* ,118 S.W.3d at 367, 2003 Tenn. LEXIS 983, 2003 WL 22383609, at *6.

In re Muir, 2003 Tenn. App. LEXIS 831, at * 13-17. Determining whether a biological parent has willfully failed to visit or support his or her child is a fact intensive inquiry, and the courts of this state are required to engage in an "individualized determination" of whether the standard has been met in a given case. ***See In re Swanson***, 2 S.W.3d 180,188 (Tenn. 1999).

2. Willful Failure to Support

Regarding the willful failure to support component of abandonment, the trial court made the following relevant factual findings:

> 157. The Hes had the ability to pay child support payments for AMH from January 28, 2001, to June 20, 2001.
>
> 158. The Hes swore, under oath, in the Petition to Modify custody they signed on May 3, 2000, that "circumstances had changed" and that the Hes were "fully willing and able to properly care and provide for AMH," yet they willfully failed to provide support for AMH after May 3, 2000.
>
> 159. Mrs. He swore under oath on April 9,2001, in the Petition to Modify custody, that the Hes were "able to provide care, support and proper supervision for AMH," yet, again, they willfully failed to provide support for AMH before and after April 9,2001.
>
> 160. Even though there was no child support order in place, the Hes knew they had an obligation to provide child support for AMH from January

28,2001, to June 20,2001, as evidenced by statements made to [the juvenile court referee] and the fact that they provided support for their son, Andy.

161. The Hes paid no support for AMH from January 2 8,2001, to June 20, 2001.

162. During the June 28, 2000, hearing before [the juvenile court referee], Mr. He told [the referee] that the Hes would send $25.00 per month to China for AMH's support, if the Hes regained custody of AMH.

163. The Hes paid someone to take their younger son, Andy, to [China] during the month of May 2001. The Hes began sending $1,000.00 per month to China to support their son, Andy, sometime during May 2001.

164. Sometime after sending her son, Andy, to China, Mrs. He purchased a new computer.

165. The Hes took vacation trips to New Orleans, Atlanta, Arizona, Ohio, and California, between June 4,1999 and June 20, 2001. The Hes also took

trips for other purposes to Atlanta and Washington, D.C., during the same time period.

166. The Hes lived in an apartment and paid monthly rental payments of $625.00 during the period from January 28, 2001, to June 20,2001.

167. The Hes used their economic resources to accumulate and purchase non-necessary possessions and to take multiple vacations for pleasure and several trips for other purposes, all consistent with the Hes' agreement with the Bakers that the Bakers would raise AMH until age eighteen, and evincing the Hes' intention to forego all parental obligations and responsibilities for AMH.

168. During the foster care period, February 24,1999, to May 23, 1999, the Hes put a sum of money, approximately $300.00, on the Bakers' couch during a visit. Mrs. He told the Bakers that the Hes would give the Bakers more money for AMH's support as soon as they were financially able. Mrs. Baker told the Hes that the Bakers could not

take the money. The Bakers were not allowed to accept money for foster children in their care, except for the $6.00 per day that Mid-South paid the Bakers under the foster care agreement with Mid-South.

169. On June 4, 1999, when the Hes signed the Juvenile Court Consent Order Awarding Custody, there was no mention of child support.

170. Because of the agreement with the Hes that the Bakers were to rear AMH to age eighteen, the Bakers did not expect the Hes to make payments to support AMH, and the Bakers never asked the Hes to pay child support for AMH, after the June 4, 1999, Consent Order Awarding Custody was entered.

172. During the Hes' approximate eighty (80) visits with AMH, between June 4,1999, to January 28,2001, they occasionally brought items for AMH .... All of these items were of insubstantial economic value and amounted to token support.

Based on these facts, the trial court concluded that the Hes abandoned A.M.H. by willfully failing to support her for the four consecutive months prior to June 20, 2001.

After reviewing the record, we must conclude that the evidence in the record does not preponderate against the trial court's findings of fact in this case. ***See In re M.J.B.***, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004). Our inquiry at this point must shift to a determination of whether these facts clearly and convincingly establish a willful failure to support A.M.H. on the part of the Hes. ***See id.***

This Court has previously addressed the "willfulness" aspect of apparent's failure to support a child, stating:

> Failure to support a child is "willful" when a person is aware of his or her duty to support, has the capacity to provide support, makes no attempt to provide support, and has no justifiable excuse for not providing the support.

In re Muir, 2003 Tenn. App. LEXIS 831, at *15; ***see also In re M.J.B.***, 140 S.W.3d at 654. Upon reviewing the trial court's findings of fact relevant to this issue, we note that many of the facts relied upon by the trial court in deciding that the Hes willfully failed to support A.M.H. constitute actions by the Hes well beyond the four month period immediately preceding the date the Bakers filed their petition

in this case. In determining whether a biological parent's conduct in failing to support a child amounts to "willfulness," it may become necessary in a given case to evaluate events occurring prior to the start of the four month period.[29] *See In*

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[29] We are cognizant of our prior statement in *In re S.M.F.*, 2004 Tenn. App. LEXIS 826, at *30-31, and we agree that an inquiry into whether a parent's conduct is "willful" should generally focus on the four months immediately preceding the filing of a petition to terminate the parental rights of the parent. *See In re D.L.B.*, 118 S. W.3 d 3 60, 366 (Tenn. 2003). We note, however, that in *In re S.M.F.*, the trial court "based its decision regarding abandonment on [the parent's] conduct occurring *after the conclusion of the statutory four-month period*." *In re S.M.F.*, 2004 Tenn. App. LEXIS 826, at *31 (emphasis added). Conduct after the termination petition is filed is obviously of no value in determining whether a parent's conduct *prior* to the filing of the petition was willful. In some instances, such as this case, a parent may have done nothing (*i.e.*, provided no support or did not visit) within the four month period. If we were constrained to considering only this "conduct," it would preclude the courts of this state from considering events occurring prior to the four month period which bear on the "willfulness" of the parent's conduct during the four month period. *See In re Swanson, 2* S.W.3d 180,188 (Tenn. 1999) (noting that the federal and state constitutions "require the opportunity for an individualized determination" before a parent's fundamental right to the care, custody, and control of the child may be severed).

The statutory four-month period, besides being legislatively mandated, necessarily limits the inclusion of totally unnecessary and irrelevant facts into the trial court's

re Adoption of Kleshinski, No. M2004-00986-C0A-R3-CV, 2005 Tenn. App. LEXIS 275, at *65 (Tenn. Ct. App. May 4, 2005) ("In the overall circumstances, Father's physical abuse of Mother during their marriage is relevant, since it is the backdrop for the trial court's consideration of Mother's claim of fear of physical abuse.").

The legislature has charged the parents of a minor child with the duty to support the child. *See* Tenn. Code Ann. § 34-1-102(a), (b) (2003); ***see also Smith v. Gore***, 728 S.W.2d 738,750 (Tenn. 1987); *In re M.J.B.*, 140 S.W.3d at 655. The Hes do not deny an awareness of the parents' general responsibility to provide financial support for their child. The Hes' awareness is evidenced by their payment of $ 1,000.00 per month for their son's support while in China, their stated intention to pay $25.00 per month for A.M.H.'s care if they regained custody and sent her to China, and their payment of $300.00 to the Bakers during the foster care period. The facts also demonstrate that the Hes were financially able to support A.M.H. during the relevant four month period. The Hes stated under oath in their petitions to modify the custody order that they were once again able to

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evaluation of willfulness. We wish to emphasize that we do not mean to imply that a trial court has carte blanche to evaluate facts outside the four-month statutory period which have no bearing on the determination of a parent's "willfulness."

provide financially for A.M.H., they purchased a new car in October of 2001, Mother purchased a new computer, and the Hes took trips to several American cities.

The Hes argue, however, that they cannot be found to have willfully failed to support A.M.H. because they were never informed they had a duty to support her while she remained in the Bakers' custody. In support of this position, the Hes cite to cases in which this Court found that the parent did not willfully fail to support the child when the Tennessee Department of Children's Services failed to inform the parent of a duty to support. *See In re J.J.C.*, 148 S.W.3d 919, 927 (Tenn. Ct. App. 2004); *State v. DeMarr*, No. M2002-02603-COA-R3-JV, 2003 Tenn. App. LEXIS 569, at *38 (Tenn. Ct. App. Aug. 13,2003) (no perm. app. filed). They also note that the June 4,1999 custody order did not mention a duty to support A.M.H., citing to cases in which this Court noted the lack of a court order directing the parent to pay support when finding that a parent did not willfully fail to support the child. *See DeMarr*, 2003 Tenn. App. LEXIS 569, at *38; *Hickman v. Hickman*, No. E2000-00927-COA-R3-CV, 2000 Tenn. App. LEXIS 653, at *4 (Tenn. Ct. App. Sept. 28,2000) (no perm. app. filed); *Martin v. Martin*, No. M1999-00210-COA-R3-CV, 2000 Tenn. App. LEXIS 178, at *4 (Tenn. Ct. App. Mar. 23,2000) (no perm. app. filed). According to the Hes, these cases stand for the proposition that "without notice, their can be no willfulness." The Hes argument in this regard is closely akin to their

previous argument regarding the constitutionality of the adoption statutes. We have previously dealt with the Hes' constitutional arguments, and we need not return to those arguments in this section of the Opinion.

For purposes of our discussion here, however, we note that both *In re J.J.C.* and *DeMarr* involved the failure on the part of the Tennessee Department of Children's Services, a state agency, to provide the parent with notice of a duty to support in cases where the child was taken from the parent's custody by the department. *See* Tenn. Code Ann. § 37-2-403 (2003) (governing the duty of an "agency" to provide parental notification of the law governing abandonment). The adoption statutes contain no reciprocal requirement. SeeTenn. Code Ann. § 36-1-101 *etseq*. (2003). At the time the Hes appealed the present controversy to this Court, no Tennessee case had addressed the effect of a parent's lack of notice regarding a duty to support in the context of a private agreement transferring custody of a child to a non-parent. Since that time, however, this Court has had occasion to address the issue, stating:

> When the Department of Children's Services or other child-placing agency obtains custody of children removed from the parents' home, it is required to notify the parents of the statutory definitions of abandonment and the criteria and procedures for termination of

> parental rights. Tenn. Code Ann. § 37-2-403(a)(2)(A). In such situations, a court cannot terminate a parent's rights on the ground of abandonment unless such notice, including the consequence of abandonment, has been given by the agency petitioning for termination or the court itself. Tenn. Code Ann. § 37-2-403(a)(2)(B). In the case before us, neither DCS nor another agency was involved, so the statute does not apply. Nonetheless, Mother's knowledge of a duty or expectation that she provide support and visit is *a factor in determining willfulness*. We find nothing in the record to indicate she was ever told she was expected to provide support or face termination of her parental rights.

In re W.B., IV, No. M2004-00999-COA-R3-PT, 2005 Tenn. App. LEXIS 262, at *38 (Tenn. Ct. App. Apr. 29, 2005) (no perm. app. filed) (emphasis added). Accordingly, we decline the Hes' invitation to formulate a *per se* rule to defeat a finding of willfulness when a biological parent voluntarily relinquishes custody of a child to a non-parent pursuant to a private agreement. Such a rule would thwart the individualized decision making required in cases of this nature, ***see In re Swanson***, 2 S.W.3d at 188, especially when the facts establish that the biological parents are clearly aware

of their duty to support their child despite the lack of formal notice.

Instead, the biological parents' lack of notice regarding the duty to support their minor child is merely *a factor* to consider when determining if that failure was "willful." *See In re W.B., IV*, 2005 Tenn. App. LEXIS 262, at *38; ***In re Adoption of Kleshinski***, 2005 Tenn. App. LEXIS 275, at * 5 3-5 7. Thus, a determination of whether the aforementioned evidence clearly and convincingly establishes that the Hes "willfully" failed to support A.M.H. hinges upon whether they "voluntarily and intentionally [chose] not to provide financial support without a justifiable excuse." ***In re M.J.B.***, 140 S.W.3d at 654 (citing ***In re Muir***, 2003 Tenn. App. LEXIS 831, at *15). The determinative fact in this case is the Bakers' refusal to accept any money offered by the Hes for the support of A.M.H. During the initial three month foster care period, the Bakers refused the $300.00 offered by the Hes. At trial, the Bakers testified that they did not expect the Hes to pay child support because they believed they would be responsible for raising A.M.H. until she became an adult. We cannot say that a parent's failure to pay child support is "willful" when any attempt to offer such support is rebuffed. We find that the evidence in the record does not clearly and convincingly establish that the Hes "willfully" failed to support A.M.H. during the four month period immediately preceding the Bakers' petition to terminate the Hes' parental

rights. Accordingly, we reverse the trial court's decision on this issue.

3. Willful Failure to Visit

Regarding the willful failure to visit component of the abandonment ground, the trial court made the following findings of fact and conclusions of law:

> 150. On January 28,2001, AMH's second birthday, the Hes came to the Bakers' home to visit AMH and requested of the Bakers that the Hes be allowed to take AMH with them to have a family portrait made. The Bakers refused the Hes' request because AMH had been ill for several days prior to January 28, 2001. The Hes then became upset and angry, started raising their voices, and Mrs. He started screaming and crying. AMH then became upset and the Bakers asked the Hes to leave the Bakers' home. The Hes refused to leave. Mr. He became very pushy and told Mr. Baker to call the police. Mr. He told the Bakers, "I won't leave here." The Bakers then called the

police to have the Hes removed from the Bakers' home.

151. Shelby County Sheriffs [Deputy Astor] . . . came to the Bakers' home in response to the January 28, 2001, disturbance call. When the Deput[y] arrived at the Bakers' home, Mr. and Mrs. Baker were calm and Mr. and Mrs. He were very irate and agitated. The Hes continued to be upset and agitated while the deput[y] conducted [his] investigation of the incident. During the investigation, the Hes were outside the Bakers' home yelling, screaming, and causing a disturbance.

152. ... After spending approximately forty-five minutes to one hour at the Bakers' home on January 28,2001, Deputy Astor told the Hes to leave the Bakers' home and not to come back that day. The reason Deputy Astor told the Hes not to come back to the Bakers' home that day was because he wanted to neutralize the situation and because he did not want Mrs. He to be arrested. Deputy Astor advised the Hes that their disagreement with the

Bakers was a civil matter, and he advised the Hes to seek legal advice from an attorney about the matter.

153. Both Mr. and Mrs. He testified that they did not return to the Bakers' home to visit AMH after the January 28, 2001, incident because they were afraid that they would be arrested by the police. However, this Court finds this testimony lacking in credibility, since there have been numerous instances when the police were called due to Mrs. He's inappropriate behavior....

174. The Hes did not attempt to otherwise call, write, or make any other attempt to contact the Bakers about visiting AMH, or to inquire about AMH's well-being from January 29, 2001, to June 20, 2001.

175. The Hes willfully failed to visit AMH from January 29, 2001, to June 20, 2001.

176. The Hes testified that they did not visit AMH after January 28, 2001, because

they feared for their personal safety if they returned to the Bakers' home for a visit. The Court finds the Hes' testimony to be lacking in credibility.

177. After January 28, 2001, the Hes willfully made the decision not to visit AMH.

178. Between January 28, 2001, and June 20,2001, the Hes never visited AMH and never made a request to the Bakers to visit AMH.

179. The Hes right to visit AMH was never restricted by any court until February 8, 2002, when this Court entered an order prohibiting the Hes from attempting "to have any contact, direct or indirect, in person, or otherwise, with AMH," until further order of the Court. The Court entered the February 8, 2002, "no-contact" order because, on February 7, 2002, the Court had ordered the Hes to deliver AMH's passport to the Clerk & Master by 4:00 P.M. that day. At 4:00 P.M. on February 7, 2002, the Hes' counsel telephoned the Court and advised the Court that the Hes had no intention of

complying with the Court's order, and the Court then entered the "no-contact" order the next day.

180. The Bakers were willing to allow the Hes to have visits with AMH after the January 28, 2001, disturbance in the Bakers' home, but the Hes never contacted the Bakers and requested any visitation with AMH.

181. Immediately after the January 28, 2001, disturbance, the Bakers decided that all future visits by the Hes would have to be arranged at a location other than the Bakers' home because of the August 1, 2000, and January 28, 2001, disturbances.

182. Immediately after January 28, 2001, in furtherance of the necessity to arrange future visitations at a site other than the Bakers' home, Mrs. Baker telephoned the Exchange Club Family Center to inquire about its ability to provide visitation services and facilities for any future visits with AMH by the Hes.

183. The Bakers were willing to allow the Hes to have visits with AMH, through

the facilities of the Exchange Club Family Center, even after Mrs. He signed her second Petition to Modify custody.

184. The only contact the Hes made with the Bakers after January 28, 2001, occurred on April 2, 2001. On that date, Mrs. He called the Bakers' home and left the following message on the Bakers' telephone answering machine: "Come to my home and get your baby bed, we are moving, thank you, bye bye."

185. The Bakers did not respond to Mrs. He's April 2, 2001, telephone call because Mrs. He did not say anything about AMH or about wanting to visit AMH. The Bakers did not go to the Hes' apartment after Mrs. He's April 2, 2001, telephone call.

186. The INS contacted Mr. He about the Hes' immigration status in March, April, or May, 2001.

187. Mrs. He signed a second Petition to Modify the Consent Order Awarding Custody on April 9, 2001, that was subsequently filed in Juvenile Court

> on May 29, 2001. The Court notes that Mrs. He did not request visitation with AMH when she filed the petition to modify custody. It is well- settled that a parent may always petition to have visitation reinstated upon a showing of changed circumstances. Mrs. Hes' [sic] willful failure to seek reinstatement of visitation with AMH demonstrates that her goal in filing the Petition to Modify to regain custody was for the sole purpose of remaining in the United States and avoiding deportation. Mrs. Hes' failure to ask the Court to reinstate visitation with AMH, when she could have easily done so, evinces Mrs. Hes' [sic] willful abandonment of AMH.

(citations omitted). After reviewing the record, we cannot say that the evidence in the record preponderates against the trial court's findings of fact, ***see In re M.J.B.***, 140 S.W.3d at 654, many of which resulted from the trial court's conclusions regarding the credibility of the witnesses. ***See Wells v. Tenn. Bd. of Regents***, 9 S.W.3d 779,783 (Tenn. 1999) (noting that we will not re-evaluate the trial court's findings regarding the credibility of a witness absent clear and convincing evidence

warranting a different result). Thus, as we did when evaluating the Hes' alleged willful failure to support A.M.H., we must now determine whether these facts constitute clear and convincing evidence of the Hes' willful failure to visit A.M.H. ***See In re M.J.B.***, 140 S.W.3d at 654.

The aforementioned facts do not constitute all of the findings of fact made by the trial court regarding this issue. In a separate section of its opinion, the trial court included numerous findings related to the Hes' visitation with A.M.H. between June 4, 1999 (the date of the juvenile court's consent order awarding custody of A.M.H. to the Bakers) and January 28,2001 (the last time the Hes visited A.M.H.).[30] As we

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[30] On appeal, the Hes raise, as a separate issue, whether the trial court erred by recognizing a purported agreement which contravenes the public policy of Tennessee. The Hes continue to dispute that they entered into an oral agreement with the Bakers whereby the Bakers would raise A.M.H. until she turned eighteen. The trial court, after hearing the conflicting testimony, found that the parties did enter into the oral agreement. We find no clear and convincing evidence in the record to disrupt this finding by the trial court. ***See Wells v. Tenn. Bd. of Regents,*** 9 S. W.3d 779,783 (Tenn. 1999). The Hes assert that, by terminating their parental rights for willfully abandoning A.M.H., the trial court, in essence, enforced an illegal contract violating the public policy of this state.

The trial court's order, when discussing the Hes' willful failure to visit and willful failure to support, merely lists this agreement as one of the facts in support of the trial

previously noted, we must constrain our focus to whether the Hes' failure to visit within the four months immediately preceding the date the Bakers' filed their petition to terminate the Hes' parental rights was willful. *See In re S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826, at *30-31 (Tenn. Ct. App. Dec. 6, 2004) (no perm. app. filed). However, to properly examine the willfulness, or lack thereof, of a biological parent's failure to visit within the four month period, it may become necessary in a given case to look to facts occurring outside the four month period. ***See In re Adoption of Kleshinski***, No. M2004-00986-COA-R3-CV, 2005 Tenn. App. LEXIS 275, at *65 (Tenn. Ct. App. May 4, 2005) (no perm. app. filed). In discussing the Hes' visitation during the period between June 4,1999 and January 28,2001, the trial court made findings related to the substance, length, and token nature of those visits. Since many of these findings have no bearing on the Hes' "willfulness" during the four month period at issue, they do not warrant mention. ***See*** Tenn. Code Ann. § 36-1 -102(l)(E) (2001) (defining "willful failure to support" as "the willful failure, for a period of four

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court's finding of willfulness on the part of the Hes. To the extent the trial court considered the agreement as a factor in deciding willfulness, we find no error. However, the record before this Court does not support the Hes' assertion that the trial court sought to enforce the parties' "contract." Accordingly, we find this issue to be without merit.

(4) consecutive months, to visit or engage in more than token visitation"); ***see also In re D.L.B.***, 118 S. W.3d 360,366 (Tenn. 2003) ("[W]e hold that only a parent's *conduct* in the four months immediately preceding the filing of a petition then before the court may be used as grounds to terminate parental rights under Tennessee Code Annotated section 36-l-102(l)(A)(i).").

On appeal, the Hes assert that there are additional facts contained in the record which warrant consideration when evaluating this issue. The Hes cite to our decision in/<< ***re Z.C.G.***, No. M2000-02939-COA-R3-CV, 2001 Tenn. App. LEXIS 783, at *19 (Tenn. Ct. App. Oct. 22,2001) (no perm, app. filed), wherein we acknowledged the validity of the trial court's credibility determinations, but we reversed the finding that the father had willfully failed to visit his child by making reference to several uncontroverted facts overlooked by the trial court. However, our decision in *In re Z. C. G.* is distinguishable from the present case because that case involved the biological mother's attempt to overtly impede the father's visitation, and we noted that the father called the mother to inquire about his visitation. ***See id.*** at * 19-20. In the present case, it is undisputed that the Hes did not call the Bakers to inquire about visitation during the four month period at issue. Moreover, any evidence tending to show that the Bakers attempted to impede the Hes' visitation at certain times prior to the four month period at issue fails to

demonstrate why the Hes did not visit A.M.H. during the four month period.

"The question of intent or willfulness is fact specific and depends on the totality of the circumstances." *In re W.B.*, IV, No. M2004-00999-COA-R3-PT, 2005 Tenn. App. LEXIS 262, at *28 (Tenn. Ct. App. Apr. 29, 2005). As with the willful failure to support component of abandonment, the Hes again argue that they did not receive notice that their failure to visit A.M.H. could result in a termination of their parental rights, therefore, their failure to visit cannot be deemed willful. The parties do not dispute that the Hes never received such notice. However, as we previously noted, the Hes lack of knowledge regarding the need to visit A.M.H. is merely "a factor in determining willfulness." *Id.* at *38. Thus, we must look to the other factual findings of the trial court to determine if they constitute clear and convincing evidence of the Hes' willful failure to visit A.M.H.

The trial court determined that, upon responding to the incident at the Bakers' home on January 28,2001, Deputy Astor instructed the Hes to refrain from returning to the Bakers home *that day*. At trial, the Hes testified that they understood Deputy Astor's instructions to mean do not ever return. The Hes also stated that they feared arrest or physical harm if they returned to the Bakers' residence after that date. Stated differently, the Hes seek to assert that they were complying with the instructions of an authority figure and felt intimidated. However, the Hes have demonstrated on several

ecasions that they are not intimidated by the authority of hers. The Bakers called the police on August 1, 2000 when other refused to leave their home after causing a sturbance. After the police arrived and instructed her to ave, Mother left the Bakers' residence. However, she bsequently returned and continued her weekly visits with .M.H. On another occasion Mother picketed the Bakers' me and a neighbor asked Mother to move her car. When other refused, the neighbor called the police. After the lice instructed Mother to move the vehicle, Mother mplied and returned to picketing the Bakers' home. On pril 2,2001, Mother called the Bakers' home to instruct em to come retrieve a baby bed that Mrs. Baker had loaned e Hes. However, Mother did not leave a message requesting visit A.M.H., further evidencing her lack of fear in ntacting the Bakers. Finally, when ordered by Chancellor lissandratos to surrender A.M.H.'s passport to the court, the es refused to comply. These incidences demonstrate that the es' justification for not returning to the Bakers' home after nuary 28, 2001 is not well founded.

The Hes engaged in several courses of conduct during e four month period immediately preceding the date the kers filed their petition to terminate the Hes' parental rights hich are relevant to resolving this issue. In February of 01, Father faxed a letter to the juvenile court and the media pressing a desire to regain custody of A.M.H. In April of 01, the Hes went to the juvenile court and spoke with Ms.

Brown. Ms. Brown stated that Mother appeared genuinely interested in regaining custody of A.M.H., and Ms. Brown prepared a petition for Mother asking the juvenile court to modify the June 4, 1999 custody order. This petition, which was filed in May of 2001, asked for a modification of custody, but it did not ask for visitation. During March, April, or May of 2001, immigration officials contacted Father about the Hes' immigration status. The trial court concluded that the Hes' attempts to regain custody of A.M.H. during this period were for the sole purpose of avoiding deportation.

The Hes assert that the record does not support the trial court's conclusion since there is no evidence showing a connection between the calls from immigration officials and the Hes' desire to have A.M.H. returned to them. We cannot conclude that the record does not support this conclusion. The trial court determined that, at the end of the initial three month foster care period, the Hes met with the Bakers and asked them to raise A.M.H. until she turned eighteen, but they wanted to retain their parental rights in order to remain in this country. In May of 2000, the Hes filed their first petition seeking to modify the June 4, 1999 custody order. Father testified that he had been contacted by immigration officials before the Hes filed this petition. After filing the May 2000 petition, Father met with Mr. Baker at the Hes' apartment to discuss the petition. One of the options presented by Father included the Bakers promising to refrain from any action which would cause the Hes to be deported. The CASA

assigned to investigate the Hes' May 2000 petition filed a report with the juvenile court expressing concern that the Hes were seeking to regain custody to avoid deportation. Thus, the Hes' desire to avoid deportation has been a consistent theme throughout the tortured history of this case.

We once again resort to a prior decision of this Court addressing the concept of "willfulness," wherein we stated:

> The willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. *American Cable Corp. v. ACI Mgt, Inc.*, 2000 Tenn. App. LEXIS 615, No. M1997-00280-COA-R3- CV, 2000 WL 1291265, at *4 (Tenn. Ct. App. Sept. 14,2000) (No Tenn. R. App. P. 11 application filed). Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct. *See Johnson City v. Wolfe*, 103 Tenn. 277, 282, 52 S.W. 991, 992 (1899); *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992); *State v. Washington*, 658 S.W.2d 144,146 (Tenn. Crim. App. 1983); *see also In re K.L.C.*, 9 S.W.3d 768, 773 (Mo. Ct. App. 2000). A person's demeanor and

> credibility as a witness also play an important role in determining intent. Accordingly, trial courts are best suited for making willfulness determinations. *In re D.L.B.* ,118 S.W.3d at 367, 2003 Tenn. LEXIS 983, 2003 WL 22383609, at *6.

In reMuir^o. M2002-02963-COA-R3-CV, 2003 Tenn. App. LEXIS 831, at * 17 (Tenn. Ct. App. Nov. 25,2003) (no perm. app. filed); *see also In re S.M.F.*, No. M2004-00876-COA-R9-PT, 2004 Tenn. App. LEXIS 826, at *24-26 (Tenn. Ct. App. Dec. 6,2004) (no perm. app. filed). Based on the record presently before this Court, we conclude that the Bakers proved, by clear and convincing evidence, that the Hes willfully failed to visit A.M.H. during the four months immediately preceding the filing of the Bakers' petition to terminate the Hes' parental rights. Accordingly, we affirm the trial court's finding that the Hes have abandoned A.M.H.

4. Father's Status as a Legal Parent

When the Bakers filed their petition to terminate the Hes' parental rights in this case, the following version of section 36-1-113 was in effect:

> The parental rights of any person who is not the legal parent or guardian of a child... may

also be terminated based upon any one (1) or more of the following additional grounds:

(ii) The person has failed, without good cause or excuse, to make reasonable and consistent payments for the support of the child in accordance with the child support guidelines promulgated by the department pursuant to § 36-5-101;

(iv) The person has failed to manifest an ability and willingness to assume legal and physical custody of the child;

(v) Placing custody of the child in the person's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child; or

(vi) The person has failed to file a petition to establish paternity of the child within thirty (30) days after notice of alleged paternity by the child's mother ....

Tenn. Code Ann. § 36-1-113(g)(9)(A) (2001). In its memorandum opinion, the trial court made the following ruling regarding Father's parental rights to AMH:

Tennessee Code Annotated § 36-1-113(g)(9)(ii), (iv), (v), and (vi): The Court concludes, by clear and convincing evidence that, *at the time of the filing of the Petition to Terminate Parental Rights*, Shaio-Qiang (Jack) He, was not the legal parent or guardian of AMH. The Court further concludes, by clear and convincing evidence, that Shaio-Qiang (Jack) He's parental rights should be terminated because:

(1) Mr. He has failed, without good cause or excuse, to make reasonable and consistent payments for the support of AMH in accordance with his ability to pay;

(2) Mr. He has engaged in only token visitation with AMH;

(3) Mr. He has failed to manifest an ability and willingness to assume legal and physical custody of AMH; and

(4) Placing custody of AMH in Mr. He's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

(emphasis added).

On appeal, Father argues that the trial court erred in relying on the above cited statute to terminate his parental rights. He cites to the voluntary acknowledgment of paternity he executed on March 15, 2002 and contends that this acknowledgment, consistent with our supreme court's decision in ***Jones v. Garrett***, 92 S.W.3d 835 (Tenn. 2002), makes the aforementioned statute inapplicable to the present case. Conversely, the Bakers argue that, since Father did not file a petition to establish paternity as required by section 36-1-113(g)(9)(A)(vi) of the Tennessee Code within thirty (30) days after he received notice he was the biological father of AMH, the aforementioned statute does apply in this case. The Bakers also assert that no Tennessee court has ever ruled that a voluntary acknowledgment of paternity is on equal footing with the statutorily required "petition to establish paternity," therefore, the statute applies since there has never been an adjudication of any such petition in this case. Moreover, the Bakers argue that the legislature recently amended the aforementioned statute, and they urge this Court to apply the policy for the amendment, as they perceive it, to the present case.

At the outset, we must determine which version of the statute at issue applies to the present case. The Bakers filed their petition to terminate the Hes' parental rights to A.M.H. on June 20, 2001. The legislature amended section 36-1-113(g)(9) of the Tennessee Code in 2003 to provide as follows:

> The parental rights of any person who, *at the time of the filing of a petition to terminate the parental rights of such person or, if no such petition is filed, at the time of the filing of a petition to adopt a child*, is not the legal parent or guardian of such child . . . may also be terminated based upon any one (1) or more of the following additional grounds[.]

Tenn. Code Ann. § 36-1-113(g)(9)(A) (2003) (emphasis added); ***see also*** 2003 Tenn. Pub. Acts ch. 231, § 10. In light of this amendment, our supreme court has noted that "there now exists statutory authority to apply the additional grounds for termination enumerated in section 36-1-113(g)(9)(A) to persons who have established legal parentage, but did so subsequently to the filing of a petition seeking termination of their parental rights."[31] ***In re D.A.H.***, 142 S. W.3d 267,272-73 (Tenn. 2004). In *In re D.A.H.*, the petitioner argued that the new statutory language should be applied retroactively to enable the trial court to apply the statute to the biological father in that case. *Id.* at 273. Our supreme court disagreed,

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[31] The Bakers filed their petition on June 20,2001. Father did not file the acknowledgment of paternity in this case until March 15, 2002, therefore, the current version of the statute would negate his attempts to establish paternity after the filing of the termination petition.

holding that the amended statute does not apply retroactively to cover events alleged in a termination petition filed prior to the amendment of the statute. *Id.* at 274-75. Accordingly, we must apply the pre-2003 version of the statute in effect at the time the Bakers filed their petition in the instant case.

Our supreme court addressed the pre-2003 language in section 36-1-113(g)(9)(A) of the Tennessee Code in ***Jones v. Garrett,*** 92 S.W.3d 835 (Tenn. 2002). In *Jones*, the biological mother and father of the child never married. *Jones*, 92 S.W.3d at 836. The mother voluntarily surrendered her parental rights to the child, and a non-relative couple subsequently filed a petition to adopt the child on April 9, 1998. *Id.* In their petition, the adoptive parents sought to terminate the parental rights of the biological father alleging abandonment of the child. Id. Thereafter, on May 26, 1998, the father filed a petition to establish his parentage of the child. *Id.* at 837. On February 5,1999, the trial court entered an "Agreed Order" declaring the father to be the biological father of the child. *Id.* At the conclusion of the hearing on the adoptive parents' petition, the trial court found that the father "failed to file a petition to establish paternity within thirty days after receiving notice from the child's mother that he was believed to be the father of the child." *Id.* As a result, the trial court terminated the father's parental rights pursuant to section 36-1-113(g)(9)(A) of the Tennessee Code. *Id.* Our supreme court disagreed, holding:

The legislature's use of the present tense ("is not the legal parent") indicates that the grounds for terminating parental rights under Tennessee Code Annotated section [36-1-113(g)(9)(A)] do not apply to persons who are legal parents at the time of the proceeding. Clearly, [the father] meets the definition of "legal parent" because he *was adjudicated to be the father* of [the mother's] child *prior to the proceeding which resulted in the termination of his parental rights*. Thus, we find that the plain language of Tennessee Code Annotated section [36-1-119(g)(9)(A)] supports [the father's] contention that the statute is inapplicable to him.

A father who establishes paternity prior to a termination proceeding should be permitted to enjoy the benefit of having established paternity. One such benefit is to be exempt from the additional grounds for terminating parental rights under Tennessee Code Annotated section [36-1-113(g)(9)(A)]. After a father has been granted an *adjudication of paternity*, it is incongruous to terminate his parental rights because he failed to timely file a petition to establish paternity.

Id. at 839 (emphasis added).

The Bakers argue that there has never been an "adjudication of paternity" in the present case. The Bakers cite to the introductory paragraph of our supreme court's holding in *Jones*, wherein the court stated as follows: "We hold that Tennessee Code Annotated section [36-1-113(g)(9)(A)(vi)] applies only to cases in which no legal relationship between the parent and child has been established." *Id.* at 836. The Bakers note that the supreme court did not elaborate on what constitutes a "legal relationship between the parent and the child." In light of the supreme court's decision in *Jones*, the Bakers seemingly concede that an "Agreed Order" establishing paternity is sufficient, however, a voluntary acknowledgment of paternity is not sufficient as it is not an "adjudication." Conversely, the Hes assert that the Bakers' position on appeal overlooks section 24-7-113 of the Tennessee Code which they contend places a voluntary acknowledgment of paternity on equal footing with an adjudication of a petition to establish paternity.

We find the Bakers' position on appeal to amount to an attempt to limit impermissibly the supreme court's holding in *Jones*. Section 24-7-113 of the Tennessee Code provides, in relevant part, as follows:

(a) A voluntary acknowledgment of paternity ... *shall constitute a legal finding of paternity on the individual named as the father of the child in the acknowledgment*, subject to rescission as provided in subsection (c). The acknowledgment, unless rescinded pursuant to subsection (c), *shall be conclusive of that father's paternity without further order of the court*.

[(b)](3) *No judicial or administrative proceedings are required*, nor shall any such proceedings be permitted, to ratify an unchallenged acknowledgment of paternity in order to create the conclusive status of the acknowledgment of paternity.

(c) (1) If the voluntary acknowledgment has not been rescinded pursuant to subsection (c), the acknowledgment *may only be challenged* on the basis of fraud, whether extrinsic or intrinsic, duress, or material mistake of fact.

Tenn. Code Ann. § 24-7-113 (2003) (emphasis added). "[Section 24-7-113 of the Tennessee Code] establishes a simplified procedure for unmarried fathers to legally establish their paternity *without the intervention of the court*, by simply

executing a voluntary acknowledgment of paternity." *In re C.A.F.*, 114 S.W.3d 524, 528 (Tenn. Ct. App. 2003) (emphasis added).

Admittedly, all of the cases which have addressed the application of the statute at issue involved a biological father filing a petition to establish paternity. *See In re D.A.H.*, 142 S. W.3d at 271; *Jones*, 92 S.W.3d at 837; In re S.M., 149 S.W.3d 632, 641 (Tenn. Ct. App. 2004); In re H.E.J., 124 S.W.3d 110,113 (Tenn. Ct. App. 2003). However, we believe that a biological father who executes a voluntary acknowledgment of paternity prior to the termination proceeding is exempt from the application of the version of section 36-1-113 (g)(9)(A) of the Tennessee Code applicable to this case. ***See Jones***, 92 S.W.3d at 840 ("A father who establishes paternity prior to a termination proceeding should be permitted to enjoy the benefit of having established paternity."). The Bakers also overlook the definition of "legal parent" found in the adoption code:

> (28) "Legal parent" means:
>
> (D) A man who has been adjudicated to be the legal father of the child by any court or administrative body of this state ... *or who has signed, pursuant to* § 24-7-113 . . . *an unrevoked and sworn acknowledgment of*

> *paternity* under the provisions of Tennessee law.

Tenn. Code Ann. § 36-1-102(28) (2001) (emphasis added). The legislature expressly qualified the application of section 36-1-113(g)(9)(A) by stating that its provisions apply when "[t]he parental rights of any person who is not the *legal parent* or guardian of such child" have not been established. Tenn. Code Ann. §36-1-113 (g)(9)(A) (2001) (emphasis added). Pursuant to the statutory definition of "legal parent," a voluntary acknowledgment of paternity entered pursuant to section 24-7-113 of the Tennessee Code and prior to the trial court's ruling on the termination petition prevents the operation of section 36-1-113(g)(9)(A) of the Tennessee Code.

Since Father executed an acknowledgment of paternity prior to the termination proceedings in the instant case, we conclude that, consistent with the supreme court's holding in *Jones* and the definition of "legal parent" in the version of section 36-1-102(28)(D) of the Tennessee Code applicable to this case, Father established a "legal relationship" between himself and A.M.H. making section 36-1-119(g)(9)(A) of the Tennessee Code inapplicable to the present case. Accordingly, we reverse the trial court's decision regarding this issue.

5. Persistent Conditions Ground for Termination

Section 36-1-113(g)(3)(A) of the Tennessee, commonly referred to as the "persistent conditions ground" for termination, provides as follows:

> (3) (A) The child has been *removed* from the home of the parent or guardian *by order of a court* for a period of six (6) months and:
>
> (i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
>
> (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
>
> (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3)(A) (2001) (emphasis added). In its memorandum opinion, the trial court concluded,

as a matter of law, that "this section of the statute [is] inapplicable to this cause because AMH was not removed from [the Hes'] custody by State action, rather [the Hes] voluntarily relinquished custody and guardianship of AMH through a consent order awarding custody."

On appeal, the Bakers argue that this ground for termination does not require removal of a child by the state before it may apply in a given case. Further, the Bakers contend that the statute does not require that the child at issue be "forcibly removed" from the parent's custody, but it merely requires that a child is "no longer an occupant of the parent's home." They assert that "removal" can even be accomplished by a biological parent's voluntary relinquishment of custody to another party. Conversely, the Hes argue that the statute requires some form of state action in accomplishing the removal before it may apply in a given case.

When we are called upon to construe the language inserted into a statute by the legislature, we employ the following principles:

> Construction of statutes and application of law to facts are questions of law, which we review under a purely *de novo* standard, according no deference to the conclusions of law made by the lower courts. *See Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). In

> construing statutes, this Court's role is '"to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope.'" *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676,678 (Tenn. 2002) (quoting *Owens v. State*, 908 S.W.2d 923,926 (Tenn. 1995); *State v. Sliger*, 846 S.W.2d 262, 263 (Tenn. 1993)). Legislative intent is derived from the plain and ordinary meaning of the statutory language unless the statute is ambiguous. *See Owens*, 908 S.W.2d at 926. If statutory language is ambiguous, then we must look to the entire statutory scheme to determine legislative intent. Id. Component parts of a statute should be construed, if possible, consistently and reasonably. *See State v. Alford*, 970 S.W.2d 944, 946 (Tenn. 1998).

In re D.L.B., 118 S.W.3d 360,365 (Tenn. 2003). "If a statute's language is expressed in a manner devoid of ambiguity, courts are not at liberty to depart from the statute's words." ***Freeman v. Marco Transp. Co.***, 27 S.W.3d 909, 911 (Tenn. 2000).

The definition section of the adoption code does not define the term "removed." *See* Tenn. Code Ann. § 36-1-102

(2003). "When approaching statutory text, courts must also presume that the legislature says in a statute what it means and means in a statute what it says there." ***BellSouth Telecomms., Inc. v. Greer***, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997). As such, we turn to the ordinary dictionary definition of the term at issue. ***See Freeman***, 27 S.W.3d at 912; ***Gleaves v. Checker Cab Transit Corp., Inc.***, 15 S.W.3d 799,803 (Tenn. 2000). "Removal" is defined as "[t]he transfer or moving of a person or thing from one location, position, or residence to another." Black's Law Dictionary 1298 (7th ed. 1999). Conspicuously absent from this definition is the requirement that removal be accomplished by a state entity. The Hes and the Amici argue that the requirement that the removal be conducted "by order of a court" adds credence to their assertion that the removal must be accomplished by a state entity in order for this ground for termination to apply. We decline to adopt such a restrictive application of the statute.

We are cognizant of the fact that many of our decisions, too numerous to cite here, deal with this ground for termination in the context of a child being removed from the parents by the Tennessee Department of Children's Services. However, our research has revealed no Tennessee case interpreting the statute at issue in the manner urged upon this Court by the Hes and the Amici. In fact, this Court has previously addressed the application of the aforementioned ground for termination in two cases where the child was

removed from the parent and placed with another party without state involvement. *See In re R.D.T.*, No. E2003-01835-COA-R3-PT, 2004 Tenn. App. LEXIS 516, at *37-39 (Tenn. Ct. App. Aug. 12,2004) (perm. app. denied, 2004 Tenn. LEXIS 947 (Nov. 8,2004)); *In re V.D.*, No. M2003-00186-COA-R3-CV, 2004 Tenn. App. LEXIS 465, at *24-28 (Tenn. Ct. App. July 26,2004) (no perm. app. filed). It is not for the courts of this state to alter or amend a statute. Instead, we must simply interpret and apply the statute as written by the legislature. ***See Gleaves***, 15 S.W.3d at 803. The statute at issue is plain and unambiguous. Had the legislature intended for this ground for termination to apply only in those instances when the Tennessee Department of Children's Services removed the child from the biological parents, it could have clearly stated as much. Accordingly, we find that the statute at issue may apply when a parent voluntarily relinquishes custody of a minor child to another party pursuant to a consent custody order. Thus, we reverse the trial court's conclusion of law on this issue.

While the trial court's legal justification for holding that section 36-1-113(g)(3)(A) of the Tennessee Code did not apply in this case constitutes error, the statute remains inapplicable for another reason. ***In/n re Audrey S.***, No. M2004-02758-COA-R3-PT, 2005 Tenn. App. LEXIS 539, at *76 (Tenn. Ct. App. Aug. 25,2005), this Court refused to interpret section 36-1-113(g)(3)(A) of the Tennessee Code, as we do in the present case, to exclude orders entered in cases

involving child custody disputes. However, in *In re Audrey S.*, we held that the persistent conditions ground for termination applies only "where the prior court order removing the child from the parent's home was based on a judicial finding of dependency, neglect, or abuse." *Id.* at *82; ***see also In re K.C., Jr.***, No. M2005-00633-COA-R3-PT, 2005 Tenn. App. LEXIS 636, at *34-37 (Tenn. Ct. App. Oct. 4, 2005). Thus, while it is possible that the persistent conditions ground for termination may apply in cases where the child is not removed by the state, the order directing the change in custody must be prompted by a finding of dependency, neglect, or abuse. The June 4,1999 consent order transferring custody of A.M.H. to the Bakers was not based on a finding of dependency, neglect, or abuse. As a result, section 36-1-113(g)(3)(A) of the Tennessee Code is inapplicable to the present case. Accordingly, we affirm the trial court's decision on this issue, albeit for different legal reasons.

G. Best Interest of A.M.H.

A finding that the record contains clear and convincing evidence of one of the statutory grounds for termination does not end our inquiry on appeal. We must now turn our attention to the trial court's conclusion that terminating the Hes' parental rights was in the best interest of A.M.H. *See* Tenn. Code Ann. § 36-1-113(c)(2) (2001). When conducting the statutorily required best interest analysis, the

trial court must consider numerous factors which may include the following:

> (I) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely

to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (2001). This list is not exhaustive, and the statute does not require the court to find the existence of every factor before concluding that terminating the biological parent's parental rights is in the child's best interest. ***State v. T.S. W.***, No. M2001-01735-COA-R3-JV, 2002 Tenn. App. LEXIS 340, at *9 (Tenn. Ct. App. May 10, 2002).

In conducting the best interest analysis in this case, the trial court made the following findings:

> 277. The Court concludes, by clear and convincing evidence, that AMH is a minor child of tender years, who has developed a strong psychological and emotional attachment to the Bakers, and that removal of AMH from the Bakers would cause substantial harm to AMH.
>
> 278. The Court concludes, by clear and convincing evidence, that the Bakers have provided AMH a safe, stable, healthy, loving environment for such a length of time that removal of AMH from that environment would cause substantial harm to AMH.
>
> 279. The Court concludes by clear and convincing evidence, that continuation

of any parent-child relationship between AMH and either Mr. or Mrs. He greatly diminishes AMH's chances of early integration into a safe, stable, and permanent home.

280. The Court concludes that the risks inherent in removing AMH from AMH's present circumstances substantially outweigh any risks posed by transcultural placement and loss of contact with AMH's biological parents, the Hes.

281. The Court concludes, by clear and convincing evidence, that there is parental misconduct or inability to parent by the Hes.

282. The Court concludes, by clear and convincing evidence, that both Mr. and Mrs. He are unfit parents, based on abandonment of AMH by both Mr. and Mrs. He.

283. The Court concludes, by clear and convincing evidence, that it is in AMH's best interest to terminate the parental rights of both Mr. and Mrs. He.

284. Applying the factors in *Tennessee Code Annotated* § 36-1-113(i)(1-9) for determining whether termination of parental rights is in the best interest of the minor child, the Court concludes, by clear and convincing evidence, that termination of the Hes' parental rights is in the best interest of AMH because:

(1) the Hes have failed to make such an adjustment of circumstances, conduct, and conditions as to make it safe and in AMH's best interest to be in the Hes' home;

(2) the Hes have failed to maintain regular, meaningful visitation and contact with AMH;

(3) the Hes have failed to establish a meaningful relationship with AMH due to the Hes neglect and inattentiveness;

(4) the effect of a change of caretakers and physical environment will have a negative and detrimental

impact on AMH's emotional and psychological well-being;

(5) the physical environment of the Hes' home is unhealthy and unsafe;

(6) Mrs. Hes' [sic] emotional instability would be detrimental to AMH; and

(7) the Hes' [sic] have failed to provide anything more than token support for AMH, despite the Hes' ability to pay such support.

On appeal, the Hes argue that the record does not support the trial court's findings. Greater Seattle has submitted a brief to this Court presenting certain social science information aimed at addressing the need for the courts of this state to consider cultural factors when deciding cases of this nature.

Since voluntarily relinquishing custody of A.M.H. to the Bakers, the Hes have not maintained regular visitation with A.M.H. *See* Tenn. Code Ann. § 36-1-113(i)(3) (2001). Regarding the initial three month foster care period, the trial court made the following finding which the Hes do not dispute:

> During the ninety-day foster care period, February 24,1999, to May 23,1999, the Hes visited the Bakers' home for approximately one (1) hour each week, a total of approximately twelve (12) hours during the first three months of AMH's life. During this period, neither the Bakers nor Mid-South placed any restrictions on the frequency or duration of the Hes' visits in the Bakers' home. The Hes never requested to visit AMH more frequently or for longer periods during the ninety-day foster care period ....

As for the Hes' visitation between June 4, 1999 (the date of the juvenile court's consent custody order) and January 28,2001 (the last time the Hes visited A.M.H.), the trial court made the following finding which the Hes do not dispute:

> Between June 4,1999, and January 28,2001, either Mr. or Mrs. He, or both, visited AMH in the Bakers' home, approximately eighty (80) times. The Hes visited AMH, on average, approximately once per week. There were some occasions when the Hes would go two weeks or longer between visits with AMH. The average time of each visit was approximately one (1) hour, with the shortest

> visit lasting approximately thirty (30) minutes and the longest visits lasting approximately two (2) hours. The approximately eighty (80) hours of time that the Hes have visited AMH, from June 5, 1999, to January 28,2001, amount to a total of less than four (4) days of AMH's life.

The Hes did not visit AMH after the January 28, 2001 incident at the Bakers' home. The only contact after that date was a phone call by Mother to the Bakers instructing them to come to the Hes' apartment to retrieve a baby bed the Bakers previously gave the Hes.

The record also establishes that the Hes have not established a meaningful relationship with A.M.H. *See* Tenn. Code Ann. §36-1-113(i)(4) (2001). Mother gave birth to A.M.H. on January 28, 1999, and the Hes voluntarily placed A.M.H. in the care of the Bakers on February 24,1999, a few weeks after she was born. A.M.H. has remained in the continuous custody of the Bakers' since that time, which amounted to the first five years of her life by the time the trial in this matter was conducted.[32] On May 8,1999, the Hes sent

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[32] A.M.H. has lived with the Bakers since she was less than one month old, and for almost seven years she has known no other parents, no other home, no other environment, no other siblings, and no other life. The dissent concedes that there is no meaningful relationship of parent and child between the

Mrs. Baker a Mother's Day card which stated: "You are the real Mom of [A.M.H.]." After the juvenile court entered the June 4,1999 consent custody order, the Hes wanted A.M.H. to call the Bakers "mommy" and "daddy" and refer to the Hes as "Jack" and "Casey." The very bond that the Hes sought to foster between A.M.H. and the Bakers was, as the record demonstrates, established in this case. Dr. Goldstein, the court appointed psychologist, testified that A.M.H. views the Bakers as her "psychological parents." In conducting his evaluation of A.M.H., he noted that she has a high level of attachment to the Bakers, but she does not have a similar attachment to the Hes. He conducted an "attachment session" in September of 2003 and noted that A.M.H.'s behavior, as demonstrated by the videotape of the session, supports these conclusions. While he agreed that A.M.H. did approach the Hes during the session, he opined that she did so based on the Hes' use of food and gifts to reinforce her interaction.

The record also demonstrates that a change in caretakers and physical environment at this stage in A.M.H.'s life will likely have an adverse affect on her emotional and psychological well being. *See* Tenn. Code Ann. § 36-1-113(i)(5) (2001). After stating his opinion regarding the strong attachment A.M.H. now has for the Bakers, Dr. Goldstein testified that A.M.H. would likely experience

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Hes and A.M.H.

separation anxiety and could possibly develop a severe depressive disorder if she were removed from the Bakers. We are also mindful of the strong attachment A.M.H. has developed to the Bakers' other children. We are cognizant of the fact that the Hes presented expert testimony to contradict Dr. Goldstein's assertions, however, the trial court found that the Hes' experts lacked credibility. We find no clear and convincing evidence in the record to disturb this finding. ***See Wells v. Tenn. Bd. of Regents,*** 9 S.W.3d 779, 783 (Tenn. 1999).

As previously discussed, we do not give the same weight as the trial court did to the Hes' failure to pay child support for A.M.H. during the pendency of this case below due to the Baker's refusal to accept such support. ***See*** Tenn. Code Ann. § 36-1-113(i)(9) (2001). Admittedly, there is nothing in the record to indicate that the Hes are presently unable to care for A.M.H. financially. However, we are permitted, as did the trial court, to consider the parties' ability to support A.M.H. should they receive custody of the child. Mother testified that, if she were to regain custody of A.M.H., she planned to return to China. She stated that she has an a one-bedroom apartment in China currently occupied by her grandparents, and she, Father, A.M.H., and their two other children would reside in the apartment. Mother indicated that her family would help to provide for the Hes' financial needs upon returning to China until Father found a job. Father noted at trial that the Bakers' have incurred a sizeable amount of

debt in prosecuting their petition to adopt A.M.H. and terminate the Hes' parental rights. However, the Bakers, unlike the Hes who face deportation, do not presently face the possibility of losing their current sources of income. Moreover, there is nothing in the record to demonstrate that, in spite of their sizeable legal bill, the Bakers are presently unable to provide for A.M.H.

The Hes also presented the testimony of their expert, Dr. Cooper, to address the issue of the "one-child" rule in China. On direct examination, Dr. Cooper testified that the Chinese government does not impose fines on parents who have more than one child outside of China then return to that country. However, under cross-examination, Dr. Cooper conceded that the Chinese government could impose such fines. In a letter addressed to this Court, the Chinese Embassy seeks to defend its "one-child" policy by stating that "there are various circumstances under which people can have more than one or two children. These circumstances apply to Chinese citizens who return to China from abroad with more than one child." Further, the letter seeks to inform the Court that the Chinese government does not impose financial penalties or remove government services and benefits for violations of this policy. It is entirely within the purview of the Chinese government, as a sovereign nation, to formulate and enforce such a policy within China. However, our focus in this case must be on the best interest of A.M.H., an American citizen, and the effect such a policy may have on

the Hes' ability to provide for her well-being should they regain custody of A.M.H. and return to China.

Most noteworthy is the fact that the letter does not elaborate on what "circumstances" warrant an exception to the "one-child" policy or if the Hes qualify for such an exception. Nor does the letter indicate what sanctions are imposed for violating the policy. Thus, we must conclude, as did the trial court, that the possibility remains that the Hes could be adversely penalized in some manner for violating the "one-child" policy which, in turn, could have an adverse affect on A.M.H.

Finally, the trial court noted the Hes' questionable character as evidenced in the record by the Hes' defiance to legal authority and untruthful statements over the course of events giving rise to the current appeal. The trial court determined that such character flaws could have an adverse effect on A.M.H. The record in this case supports this conclusion.

The record, viewed in its entirety, fully supports the trial court's conclusion that terminating the Hes' parental rights is in the best interest of A.M.H. Accordingly, we affirm the trial court's decision in this regard.

V.
CONCLUSION

In the dissenting opinion filed in this case, it is argued that we apply "a different standard than would have been applied had the termination of parental rights been sought by the Tennessee Department of Children's Services ("DCS")." The dissent contends that our approach on this issue "is wrong." The dissenting opinion is replete with references to how the result in this case would be different if only DCS were involved. Respectfully, this Court can only adjudicate the case before it. We are not at liberty to create hypotheticals or to wish that the facts in a given case were otherwise.

We are asked simply to resolve whether the Hes' conduct in the four months immediately preceding the Bakers' petition to terminate their parental rights was willful. The dissent acknowledges that in *In reW.B.*, TF we stated that, in cases involving private parties, a parent's lack of knowledge regarding the abandonment ground for termination is merely "*a factor* in determining willfulness." *In re W.B., IV*, No. M2004-00999-COA-R3-PT, 2005 Tenn. App. LEXIS 262, at *38 (Tenn. Ct. App. Apr. 29,2005) (emphasis added). A "factor" is defined as "[o]ne of two or more quantities that when multiplied together yield a given product." Webster's II New College Dictionary 401 (2001). A factor is, therefore, but one element to be considered, perhaps among many, in reaching a conclusion. Thus, whether or not a private party

with custody of the child notified the biological parents of the potential grounds for terminating their parental rights is but one factor to be considered. Yet, the dissent would impose *a. per se* rule in cases of this nature, stating: "How can this disparity be justified? Fairness dictates that parents and petitioners in all termination cases be held to the same standard, regardless of whether DCS is involved ... ."

The answer to the question posited by the dissent is quite simple. Ours is a limited role. "The grounds for terminating parental rights in Tennessee are defined by statute." ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002); ***see also*** Tenn. Code Ann. § 36-1-113(g) (2003). As the judicial branch of government, we are to address the issue presented by the Hes in this case and asercertain whether the statutory scheme adopted by the legislature comports with the Fourteenth Amendment of the United States Constitution. The dissent overlooks the constraints, or the lack thereof, imposed by the United States Constitution and proceeds to formulate what it believes to be sound policy in this area of the law. We are told repeatedly by the dissent that it is not fair for the legislature to require DCS to provide parents with notice of the abandonment ground for termination while not requiring the same notice when private individuals are involved. ***Compare*** Tenn. Code Ann. § 37-2-403(a)(2) (2003) ***with*** Tenn. Code Ann. § 36-1-102 (2003) ***and*** Tenn. Code Ann. § 36-1-113(2003). The reason the legislature is permitted to make this distinction is well settled in the law. When DCS, a

state agency, seeks to terminate a biological parent's parental rights, the notice requirement imposed upon DCS by the legislature seeks to ensure that the biological parent's fundamental rights as parents are protected from unwarranted state infringement. The United States Supreme Court has recognized as much, stating: "When the *State* moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." ***Santosky v. Kramer***, 455 U.S. 745, 753-54 (1982) (emphasis added.) Why do we draw a distinction when private parties are involved? Because it is only state action, not the actions of private individuals, which the Fourteenth Amendment seeks to safeguard against. ***The Civil Rights Cases***, 109 U.S. 3, 11 (1883). Therefore, the legislature is permitted to make the distinction which the dissent finds most troubling.

While the dissent may find this distinction unjust, it comprises the legal framework which must guide our resolution of this issue. "The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial." Tenn. Const, art. II, § 1. "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." Tenn. Const, art. II, § 2. "It is primarily for the Legislature to determine the public policy of this state_____" ***Cary v. Cary***, 937 S.W.2d 777, 781 (Tenn. 1996). "When the legislature, *acting within its constitutional powers*, has spoken upon a

particular subject, its utterance is the public policy of the State upon that subject, and *the courts are without power to read into the Constitution a restraint of the legislature* with respect thereto." ***Cavender v. Hewitt***, 239 S.W. 767, 768 (Tenn. 1921) (emphasis added). "[I]f a modification or change in such policy is desired, the lawmaking department must be applied to, and not the judiciary, whose function is to declare the law but not to make it." ***Fields v. Metro. Life Ins. Co.***, 249 S.W. 798, 800 (Tenn. 1922). By extending an invitation to our supreme court and the state legislature to enact changes in the law, the dissent, after trying to convince us that the law supports a different conclusion on this issue, concedes that the law is not as the dissent attempts to portray it. Otherwise, no such invitation would be necessary.

We are troubled by the dissent's attempt to fit the facts of this case into our decision in *In reW.B., IV*. The dissent states: "The majority in this case dismisses the Hes' lack of knowledge as 'merely' a factor to consider in determining whether their failure to visit A.M.H. was willful, *even though that same factor was found to be determinative in In re W.B., IV*" (emphasis added). Regarding the mother's failure to visit her children in *In reW.B., IV*, the Court, in addition to noting the lack of notice to the mother, also noted that the mother did not know the whereabouts of her children. *In re W.B., IV*, 2005 Tenn. App. LEXIS 262, at *36. As the Court stated, "[i]t is difficult to understand how Mother could have visited the children while she was unaware of their whereabouts." *Id.* In

the present case, the Hes knew the whereabouts of A.M.H. for the entire four month period at issue. Our reading of *In re W.B., IV* reveals that the Court found that the mother's lack of notice of the ground of abandonment *coupled with* the mother's lack of knowledge regarding the whereabouts of her children constituted evidence that the mother's failure to visit was not willful. Thus, it is difficult to understand how the dissent justifies its conclusion that the lack of notice of the ground of abandonment *alone* produced the result this Court reached in *In re W.B., IV*.[33]

The dissent devotes a significant amount of discussion to our failure to discuss the trial court's finding that the visitation by the Hes prior to the four month period at issue constituted "token visitation." The dissent refers to the statutory definition of "token visitation," see Tenn. Code Ann. § 36-1-102(1)(C) (2003), and concludes that "visitation is token if it is either perfunctory, or of an infrequent nature, or both." (emphasis in original). The dissent contends that the Hes' visitation with A.M.H. prior to the four month period at

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[33] The dissent charges that we "sidestep the real problem" because the statutory definition of abandonment is the same regardless of whether the petitioner is DCS or a private individual; however, the dissent's complaint to the legislature does not relate to the definition of abandonment, but rather to the question of notice. The dissent attempts to apply a blanket rule both to state action and the conduct of private parties, although the statute by its terms addresses only state action.

issue is crucial to a determination of whether their failure to visit within the four month period was willful.[34]

Pursuant to the definition of "token support," the courts of this state are only concerned with whether the visitation *during the four month period* at issue was token in nature. See Tenn. Code Ann. § 36-l-102(l)(E) (2003) (defining "willfully failed to visit" as "the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation"). Thus, when we examine the four-month period at issue in this case, we find that the Hes did not visit their daughter at all. The dissent notes that visitation can be token if it is "perfunctory" or "infrequent." It is difficult to see how *no visits* during the four-month period at issue cannot, therefore, be included in the definition of "token visitation." Instead of focusing on the statutory

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[34] Conduct prior to, or outside of, the statutory four-month period is relevant only to the question of willfulness, or support, or the lack thereof, *within the four-month period* prescribed in the statute. This principle does not open the floodgates so as to allow a broad sweep of allegations and events in the hope that one or more of them might stick. There must be a nexus established between the events alleged and the crucial four-month period that we are mandated to examine. The dissent has failed to show that facts which occurred *before* the statutory period are determinative of whether the Hes' failure to visit *within* the four months was willful.

four-month period at issue, the dissent contends that we should consider the pattern of visitation engaged in by the Hes since the beginning of their relationship with the Bakers in order to ascertain if they willfully failed to visit A.M.H. What else should the Court consider outside of the statutory four-month period? One could consider the fact that the Hes wanted the Bakers to raise A.M.H. until she turned eighteen so the Hes could remain in the United States. There is the fact that the Hes wanted A.M.H. to call the Bakers "mommy" and "daddy" and the Hes "Jack" and "Casey" which could be relevant to a determination of the Hes' willfulness. These facts occurred, however, well beyond the four month period at issue. We are careful to note that, under our statutory scheme, they can have *no bearing* on our determination of whether the Hes' conduct within the four-month period was willful. The dissent acknowledges the most crucial fact to our determination: "Of course, all of the Hes' visits with A.M.H. took place prior to the commencement of the statutory four-month period."

We approach our duty in this case somewhat differently than the dissent by confining our analysis to the parameters of the statute which must guide our decision. The legislature has directed that we are to consider the parents' conduct in the four months preceding the filing of the petition to terminate their parental rights. *See* Tenn. Code Ann. § 36-1-102(1) (2003). In the present case, it is undisputed that

the Hes did not visit A.M.H. during the four months prior to the Bakers' petition to terminate the Hes' parental rights.

Once the parameters of our analysis are limited to the statutory four-month period, it is apparent that the line of demarcation between the majority opinion and the dissent is not as distinct as it might first appear. The dissent concedes the existence of many of the facts we deem determinative of this issue. The dissent notes that "[i]t is undisputed that the Hes did not visit A.M.H. after the altercation at the Bakers' home on January 28, 2001"; "The majority rightly concludes" that "the Hes' failure to visit was not based on the Hes' fear that they would be arrested and physically harmed, as the Hes asserted"; and, "In the petition Brown prepared, Mother sought custody of A.M.H., but did not request visitation."

With reference to the Hes' motivation to avoid deportation, the dissent focuses upon Father's testimony regarding the correlation between the calls from immigration officials and the filing of the petitions to regain custody of A.M.H., finding such testimony to be inconclusive. The dissent argues that "there is no evidence on the substance of the conversation between Father and the INS official, any issues raised by the official, or how the filing of the petition for custody would have addressed any INS concerns." The dissent seeks to impose a "proof beyond a reasonable doubt" standard in parental termination cases. However, our case law does not support the dissent's characterization of the evidence. When evaluating a trial court's decision in parental

termination cases, we must first evaluate a trial court's findings of fact *de novo*, presuming those findings to be correct unless the *preponderance of the evidence is otherwise*. ***In re M.J.B.***, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004). (emphasis added). "Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, *clearly and convincingly* establish the elements required to terminate a biological parent's parental rights." *Id.* (emphasis added). "'Willfulness' does not require the same standard of culpability required by the penal code." ***In re Muir;*** No. M2002-02963-COA-R3-CV, 2003 Tenn. App. LEXIS 831, at *14 (Tenn. Ct. App. Nov. 25, 2003) (citation omitted). "Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. Accordingly, triers-of-fact must infer intent from circumstantial evidence, including a person's actions or conduct." *Id.* at *17 (citations omitted).

It is apparent that the dissent has lost sight of the manner in which the trier of fact evaluates evidence. Father's testimony is but one component of the trial court's finding that the Hes' reasons for filing the petitions to regain custody were driven by a desire to avoid deportation. As we set forth heretofore, the record is replete with instances when the Hes expressed concerns about deportation as it relates to custody of their daughter. Parental termination cases are factually driven and require individualized decision making. ***See In re***

Swanson, 2 S.W.3d 180, 188 (Tenn. 1999). The trier of fact is permitted to draw all reasonable inferences from the evidence presented on an issue. We must also defer to credibility determinations made by the trier of fact. ***See Wells v. Tenn. Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999). From the aggregate of the aforementioned facts, it was reasonable for the trial court to infer that the Hes' actions in filing the petitions to regain custody of their daughter were designed to avoid deportation. On appeal, this Court is not permitted to reject the inferences drawn by the trial court from the circumstantial evidence and substitute our own inferences instead. ***See State v. Thacker***, 164 S.W.3d 208, 221 (Tenn. 2005) (citing ***State v. Evans***, 108 S.W.3d 231, 236-37 (Tenn. 2003)).

The Bakers have asked this Court to reverse the trial court's order consolidating their petition to terminate the Hes' parental rights with Mother's petition to modify the June 4, 1999 custody order, and we find this issue to be without merit. Regarding the trial court's rulings on the Hes' pre-trial motions, we affirm the trial court's order denying the Hes' motion, pursuant to Rule 60.02, to set aside the June 4,1999 custody order; we affirm the trial court's order denying the Hes' motion to dismiss the Bakers' adoption petition; and we affirm the trial court's order denying the Hes' motion to bifurcate the proceedings. Regarding the Hes' constitutional arguments, we find that section 36-1-102 and section 36-1-113 of the Tennessee Code are not unconstitutional in

light of the facts in this case. We conclude that the trial court did not err in ruling that the notice provisions found in section 37-2-403 of the Tennessee Code did not apply in this case. We conclude that the trial court did not err by ruling that the "superior parental rights doctrine" did not apply to Mother's petition to modify the June 4, 1999 consent custody order. Regarding the grounds for termination, the trial court did not err in ruling that the "settled purpose doctrine" did not apply in this case. Turning to the abandonment ground for termination, we reverse the trial court's ruling that the Appellants willfully failed to support A.M.H. in this case as the record does not contain clear and convincing evidence to support such a finding. We conclude that the trial court erred in finding that Father was not the legal parent of A.M.H. when the Appellees filed their petition in this case, therefore, termination of Father's parental rights under section 36-1-113(g)(9) of the Tennessee Code was not appropriate in this case. The trial court erred in finding that the "persistent conditions" ground for termination codified at section 36-1-113(g)(3)(A) of the Tennessee Code requires the removal of a child by the state. For other legal reasons, however, we affirm the trial court's ruling that section 36-1-113(g)(3)(A) of the Tennessee Code does not apply to this case. We affirm the trial court's ruling that the record contains clear and convincing evidence to support a finding that the Appellants willfully failed to visit A.M.H., therefore, termination of their parental rights was justified in this case.

Finally, we affirm the trial court's conclusion that terminating the Appellants' parental rights is in the best interest of the minor child at issue in this case.

We are cognizant of the fact that the parties have raised other issues in their briefs which are not addressed in this Opinion.[35] In light of our holdings on the issues which are discussed in this Opinion, a discussion of the other issues raised by the parties would have no bearing on the outcome of the case on appeal, therefore, they are pretermitted. Costs of this appeal are to be taxed to the Appellants, Shao-Qiang (Jack) He and Qin Luo (Casey) He, and their surety, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE

[35] Specifically, the Hes ask this Court to evaluate the following: whether the trial court erred in issuing a no-contact order prior to a trial in this matter; whether the trial court erred in entering an order appointing the Bakers guardians of A.M.H.; and whether the trial court erred in denying their motion to set aside the order appointing Mid-South as next friend to investigate the Bakers' adoption petition. As previously noted, a majority of the issues presented by the Bakers are not independent issues which deserve evaluation, but they constitute responses to the issues raised by the Hes in this case. From the Bakers statement of the issues, we have elided two independent issues which have been addressed herein.

IN THE COURT OF APPEALS OF TENNESSEE

AT JACKSON

February 16, 2005 Session

IN RE ADOPTION OF A.M.H., A MINOR

JERRY L. BAKER AND LOUISE BAKER

v.

SHAO-QUIANG (JACK) HE AND WIFE, QIN (CASEY) LUO

An Appeal from the Chancery Court for Shelby County
No. Ch-01302-3 Robert L. Childers, Chancellor
(by Designation)

No. W2004-01225-COA-R3-PT -
Filed November 23, 2005

PARTIAL DISSENT

Holly M. Kirby, J., concurring in part and dissenting in part.

I. INTRODUCTION

While I concur in the majority opinion on some issues, I must dissent from the affirmance of the termination of the Hes'

parental rights on the ground of willful failure to visit.[1] I would instead reverse the trial court's termination of the Hes' parental rights.

For all of its lengthy analysis, the majority fails to address key issues relating to the overriding question of whether the Hes "willfully" failed to visit A.M.H. during the four months preceding the Bakers' petition to terminate the Hes' parental rights. In my view, the Hes' failure to visit A.M.H. during the four months preceding the petition for termination cannot be characterized as "willful"" under the statute because: (a) the Hes engaged in regular, once-a-week visitation with A.M.H. prior to the January 28, 2001 incident when visitation ceased; (b) during the four months preceding the filing of the termination petition, the Hes pursued legal recourse in Juvenile Court in an effort to regain custody of A.M.H.; (c) the evidence in the record does not support the

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[1] concur in the following conclusions reached by the majority: (l) the settled purpose doctrine is no longer applicable; (2) the termination of the Hes' parental rights on the ground of willful failure to support should be reversed; and (3) the termination of Father's parental rights on the basis that he was not the "legal parent" of A.M.H. should be reversed. On the ground of persistent conditions, I concur in the result based on the reasoning in *In re AudreyS.*, 2005 WL 2051286, at *21-*24 (Tenn. Ct. App. Aug. 25,2005), *perm. app. dismissed* (*Jem.* Nov. 4, 2005).

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trial court's conclusion that the Hes efforts to regain custody were motivated solely by the Hes' desire to avoid deportation; and (d) the Hes did not know that failing to visit, A.M.H. for four months could result in the termination of their parental rights. I believe that, throughout its analysis on the issue of willfulness, the majority applies a different standard than would have been applied had the termination of parental rights been sought by the Tennessee Department of Children's. Services ("DCS "). This is wrong. Thus, for these reasons, I would hold that the alleged ground for termination of the Hes' parental rights, their "willful" failure to visit A.M.H., has not been proven by clear and convincing evidence. In addition, I believe that the issuance of the February 2002 nocontact order, prohibiting all contact between the Hes and A.M.H., constituted clear error and unfairly impacted the evidence. All of these issues are discussed below.

II. "WILLFUL" FAILURE VISIT

The Bakers sought to terminate the Hes' parental rights on the ground that they had "abandoned" A.M.H. The term "abandonment" is defined in the termination statutes, and we are bound by that definition:

> (I)(A) "Abandonment" means ... that:
>
> (I) For a period of four (4) consecutive months immediately preceding the

> filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have **willfully failed to visit or** have **willfully failed to support or have willfully failed to make reasonable payments toward the support** of the child ....

T.C.A § 36-1-102(l)(A)(i) (Supp. 2004) (emphasis added). Thus, unless the biological parent's failure to visit or support is "willful," abandonment cannot be proven. The failure to support or visit a child is "willful" only if the parent is aware of his or her duty, is able to support or visit and makes no attempt to do so, and has no justifiable excuse for failing to support or visit. *In re S.M*, 149 S.W.3d 632, 642 (Tenn. Ct. App. 2004).

As outlined below, the Hes had a justifiable excuse for not visiting during the pivotal fourmonth period, and they had no knowledge that they had a duty to visit or risk losing their parental rights. Therefore, their failure to visit should not have been found to be willful, and their parental rights should not have been terminated.

(a) "Token" visitation prior to the four-month period

The majority fails to review the trial court's finding that the Hes' visitation with A.M.H. prior to the statutory four-month period amounted to "token" visitation. Analyzing the Hes' conduct during this time, however, is important to put into proper context their actions *during* the pivotal four-month period.

The phrase "willfully failed to visit," to which Section 36-1-102(1)(A)(i) refers, is defined as "the willful failure, for a period of four (4) consecutive months, to visit or engage in more than *token* visitation." T.C.A § 36-1-102(l)(E) (Supp. 2004) (emphasis added). Under the statute, "'token visitation' means that the visitation, under the circumstances of the individual case, constitutes nothing more than perfunctory visitation or visitation of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child." T.C.A § 36-1102(l)(C) (Supp. 2004). Thus, visitation is token if it is *either* perfunctory, *or* of an infrequent nature, or both. ***See In reMT.***, No. W2002-03050-COA-R3-CV, 2003 WL 22351012, at *4 (Tenn. Ct. App. Oct. 14,2003). Courts have found visitation to be "perfunctory" if the visiting parent has merely a physical presence at the visits and is inattentive or indifferent toward the child. *See **DCS** v. L.L.T,No.* E2003-00501-COA-R3-JV, 2003 WL 23094559, at *4 (Tenn. Ct. App. Dec. 30,2003); ***In re Shipley (DCS v. Shipley)***, No. 03A01-9611-JV-00369, 1997

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WL 596281, at *4 (Tenn. Ct. App. Sept. 29, 1997). Whether visitation is "of such an infrequent nature or of such short duration as to merely establish minimal or insubstantial contact with the child" must be decided on a case-bycase basis. ***See***, e.g., *In re MT*, 2003 WL 22351012, at *4-*5; ***In re Kratochvil (Coone v. Kratochvil)***, No. 03A01-9712-CR-00536, 1998 WL 681334, at *4 (Tenn. Ct. App. Oct. 2, 1998).

The trial court below concluded that the Hes' visitation with A.M.H. prior to the January 28, 2001 incident amounted to only "token" visitation. Noting that there were about eighty visits in a twenty-month period, roughly once each week and lasting an average of an hour per visit, the trial court calculated that the Hes had spent approximately eighty hours visiting with A.M.H. It observed that this "amounts to a total of less than four (4) days of A.M.H. 's life." The trial court also found that the Hes sometimes missed visits, rescheduled visits, and scheduled visits at times that were inconvenient to the Bakers. It determined that Father "interacted very little with AMH during the visits," and that he talked with Mr. Baker most of the time. The trial court made no findings regarding Mother's interaction with A.M.H. during visits. It concluded from these facts that "[from June 4, 1999, through June 20,2001, the Hes' visits with AMH were so sporadic, and of such short duration, that it evinced a desire to forego their parental responsibilities to AMH, and it was in conformity with the Hes' agreement that the Bakers would raise AMH until age eighteen." In

addition, the trial court determined that the "frequency and duration of the Hes' visits with AMH evinced their intention to have only enough contact with AMH to serve the Hes' stated objective to avoid deportation." The trial court also found that "[t]he Bakers did not obstruct, inhibit, discourage, or otherwise interfere with any reasonable desire on the part of the Hes to visit with A.M.H."

The trial court's finding that the Hes' visitation with A.M.H. was "insignificant, token visitation" is the first juncture at which the trial court's analysis went awry. The trial court's holding on this issue finds no support in cases addressing the issue, which typically involve a scenario in which DCS is the petitioner seeking termination of the natural parents' rights.

Remarkably, the trial court's finding that the Hes' visitation with A.M.H. was "token" is not reviewed by the majority. The majority first acknowledges this Court's prior decisions holding that it may be necessary to look at facts occurring outside the statutory four-month period in order to determine the willfulness of a biological parent's failure to visit during the four-month period. Despite having acknowledged this, the majority does not, in fact, consider the Hes' visits. Instead, the majority dismisses the trial court's findings on the Hes' nearly two years of regular visitation with A.M.H., saying only that "they do not warrant mention." The

majority later goes even further, asserting that facts which occur before the statutory four-month period "can have no bearing on our determination of whether the Hes' conduct within the four-month period was willful." (emphasis in original). Not only is this inconsistent with the majority's prior statement and previous decisions by this Court, it is plainly wrong. Common sense tells us that, in evaluating the parents' conduct during the four-month period, their conduct before that four-month period, both good and ill, is relevant as background. In this case, then, the history of the Hes' visits with A.M.H. must be examined in order to evaluate fully whether their failure to visits after the January 28,2001 incident was willful.

In a typical case in which DCS has taken the child into protective custody, DCS establishes a visitation schedule for the parent, and that schedule is incorporated into a written parenting plan. The parent is informed that he or she is expected to visit the child in accordance with the schedule, and if the parent does not substantially comply with the plan, DCS may bring an action to terminate the parent's rights.

In this case, of course, DCS was not involved. Rather, the parties agreed to the roughly once a-week visitation, in accordance with the typical practice of Mid-South Christian

Services.[2] In contrast to a case in which DCS sets a visitation schedule, all of the Hes visits with A.M.H. resulted from the Hes' initiative by contacting the Bakers, setting up the visits, and getting to the Bakers' home.[3] Despite various obstacles, such as lack of money, lack of transportation, the parties' conflicting work schedules, and the birth of the Hes' second child in November 2000, the Hes visited A.M.H. regularly. Moreover, Mrs. Baker's journal shows clearly that, during the visits, Mother consistently made earnest attempts to connect with A.M.H.

Though the Bakers accommodated the Hes' visits, it is undisputed that the Bakers would not permit the Hes to have overnight visits with A.M.H. and never permitted the Hes to take A.M.H. away from the Bakers' home. Relatively early in the parties' relationship, when A.M.H. was eight months old,

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[2] When Mid-South set up the initial foster-care arrangement, the once-a-week visitation was implemented. This was a typical schedule visitation for interim foster-care arrangements set up by Mid-South. When Mid-South bowed out, the parties continued the same schedule.

[3] When DCS is involved, visits typically do not take place in the foster parent's home, thus diminishing the likelihood of emotionally charged confrontations between the biological parent and the foster parent.

Mrs. Baker's journal reflects her desire to reduce the frequency of the Hes' visitation:

"We would like to get visits to every other week. We felt like they would wean away, but the last 2 visits we could see Casey [Mother] is wanting to come more." In fact, most of the major disputes between the Hes and the Bakers arose from the Hes' efforts to get more time with A.M.H. When the Hes filed their May 2000 petition in Juvenile Court to regain custody of A.M.H., the Bakers were "floored" by it. This led to the tense meeting between Father and Mr. Baker at which they wrote down three options for changing the arrangements in place at that time. All of those options involved the Hes either taking custody of A.M.H. or increasing their visitation. These events prompted the Bakers to hire attorney Weaver to respond to the Hes' first petition for custody and to advise the Bakers on terminating the Hes' parental rights, even before there had been any break in regular visitation.

Neither the Bakers nor the trial court cited any caselaw supporting the trial court's finding of "token visitation" in a case in which the noncustodial parents visited the child eighty times, approximately once per week, over the course of some twenty months. Indeed, one-hour-per-week visitation is at times the *target* amount visitation established by DCS in a permanency plan. *See, e.g., In re M.J.J. No.* M2004-02759-COA-R3-PT, 2005 WL 873305, at *2 (Tenn. Ct. App.

Apr. 14, 2005) (noting that the mother "was allowed one hour per week of supervised visitation" under the parenting plan); DCS v. CMS, M2001-02893-COA-R3-JV, 2002 WL 31126645, at *2 (Tenn. Ct. App. Sept. 26, 2002) (noting that visitation was initially set at one hour per week).

In fact, the level of visitation determined to be "token" has virtually always been far less than the eighty once-per-week visits in this case. *See, e.g., DCS v. Lilly, No.* W2003-02156-COA-R3-PT, 2004 WL 948397, at *3 (Tenn. Ct. App. Apr. 30, 2004) (finding token visitation when the mother visited three times during the year prior to termination petition); *DCS v. Atkinson,* No. W200302109-COA-R3-PT, 2004 WL 948405, at *4 (Tenn. Ct. App. Apr. 30, 2004) (finding token visitation when the mother visited three times during the four months prior to termination petition, but had lost all contact with DCS during the five months prior to that time period); *In re MCG.*, No. 01A01-9809-JV-00461, 1999 WL 332729, at *7 (Tenn. Ct. App. May 26, 1999) (finding token visitation when the mother visited twice in the nine-month period prior to termination petition); *PCS' v. Darr,* No. 03A01-9706-JV-00213, 1998 WL 128874, at *4 (Tenn. Ct. App. Mar. 24, 1998) (finding token visitation when the mother visited once in the ten-month period prior to termination petition); *see also In reMT,* No. W2002-03050-COA-R3-CV, 2003 WL 22351012, at (Tenn. Ct. App. Oct. 14, 2003) (finding token visitation when the

mother visited eight times out of forty scheduled visits, and the mother had no interaction with the child during the visits); *DCS v. D.D.B.*, No. M2002-00523-COA-R3-JV, 2003 WL 1610875, at *4 (Tenn. Ct. App. Mar. 28, 2003) (finding token visitation when the mother visited eight times over a period of twenty-eight months); *Coone v. Kratochvil (In reKratochvil)*,No. 03A01-9712-CR-00536, 1998 WL 681334, at *4 (Tenn. Ct. App. Oct. 2, 1998) (finding token visitation when the father had eleven short visits during the nine months prior to termination petition, and did not want to feed the child or change the child's diaper at the visits).

In addition to frequency, courts will consider whether the nature of the visit is perfunctory, or whether the parent was indifferent toward the child during the visits, in determining whether the visit was token. See L.L. T, 2003 WL 23094559, at *4 (finding token visitation when the mother attended all but two visits, but "spent her visitation sessions applying makeup, sleeping, and arguing with Father rather than properly focusing her attention on and caring for the child"); *Shipley*, 1997 WL 596281, at *4 (finding token *visit*ation when the father visited four times during the four months prior to his imprisonment, but slept during the visits).

In this case, the visitation by the Hes was set in accordance with Mid-South's regular practice during the interim foster-care period and was continued by the agreement

of the parties. Despite the Hes' periodic attempts to expand visitation, it remained within the boundaries the Bakers had established. Until the visitation ended on January 28,2001, the frequency and regularity of the visits were well in excess of that which has been found to be token in DCS cases. At least as to Mother, the evidence does not support a finding that she was indifferent or inattentive to A.M.H. during the visits. Whether the Hes' visitation was "token" should be judged by the same standard as cases in which the visitation schedule is set by DCS. Under this standard, it seems clear that the trial court erred in determining that the Hes' visits with A.M.H. prior to January 28, 2001 were "token."

Of course, all of the Hes' visits with A.M.H. took place prior to the commencement of the statutory four-month period. Nevertheless, it is against this backdrop that the majority should evaluate the willfulness of the Hes' failure to visit during the pivotal four-month period.

(b) The Hes' conduct during the four months preceding the filing of the termination petition

It is undisputed that the Hes' did not visit A.M.H. after the altercation at the Bakers' home on January 28, 2001, just over four months prior to the filing of the petition for termination on June 20, 2001. Evidence of the Hes' actions during the four-month period must be examined to determine

if that evidence shows clearly and convincingly that their failure to visit constitutes willful abandonment. As noted above, the Hes' failure to visit during the critical time was not a continuation of past conduct or of general indifference to A.M.H. Rather, it was an abrupt change from the prior regular visitation. Thus, the background for the Hes' sudden decision to cease visitation becomes important in assessing the willfulness of their failure to continue to visit.

The trial court found that the Hes' failure to visit was not based on the Hes' fear that they would be arrested or physically harmed, as the Hes asserted. The majority rightly concludes that this finding is supported by the evidence. Nevertheless, even before the January 28, 2001 incident, evidence from Mrs. Baker's journal shows that the relationship between the Bakers and Hes clearly had soured. The Bakers would later say that, while they were not willing to continue visits in their home after the January 28,2001 incident, they would have been willing to continue the visits at a neutral location. If so, this was never communicated to the Hes. The Bakers had always required that the Hes' visits take place in their presence, in their home. Realizing that visitation in the Bakers' home was no longer feasible, it was reasonable for the Hes to surmise that they would need court intervention, as they had been told by attorney Weaver when the parties agreed to the custody arrangement.

As the majority opinion recognizes, on February 15, 2001, the Hes faxed a letter dated February 1, 2001 to the Juvenile Court and the media expressing a desire to regain custody of A.M.H. The letter briefly recounted, from the Hes' perspective, the difficulties during August 2000 and January 2001, when the Hes were forced to leave the Bakers' home:

> On August 2, 2000, my wife visited our baby upon the appointment and she was trying to stay 10 more minutes (normally a visit lasts one hour). Bakers immediately asked the police to drive my wife away from their home. On Jan. 28, 2001 (our baby's two-year birthday), we made the appointment to take our baby together to a studio for picture taking, a few minutes after we came to the Baker's family, they refused our request. We begged them to let us go to the studio, and Casey was crying and told them that 2-year birthday was a very special day for the baby and for our family. The Bakers still refused and claimed that they would call the police. Soon the police came and kicked us out of their home.
>
> My wife determined that she would rather die than being separated from her child. In the past two years she has been suffering a

great deal emotionally. We have decided to take our child back and go back to China.

The letter then asks the assistance of the court to"[p]lease help us to have our baby return to her own parents."

Juvenile Court employee Sarah Cloud testified that, during the four-month period, the Hes repeatedly contacted Juvenile Court with requests for assistance in regaining custody of A.M.H. She also said that the Hes were unrepresented by counsel. The Hes had brought to Juvenile Court a photo album with several small pictures of A.M.H. and one larger picture. The Hes told Cloud that they thought their arrangement with the Bakers was only temporary custody with open visitation.

On April 9, 2001, a Juvenile Court probation officer, Candace Brown ("Brown"), prepared for the Hes a petition to modify the consent custody order to restore custody of A.M.H. to the Hes. Both Mother and Father were present in Brown's office that day, and Father told Brown that they wanted custody of A.M.H. Nevertheless, after Brown prepared the petition, she had only Mother sign it.[4] Brown would later

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[4] Brown listed both Mother and Father as petitioners, but she

describe Mother's demeanor during the meeting as "[p]retty much hysterical .. crying, and she couldn't stop crying _ She wanted her daughter back." On May 29, 2001, the petition for custody was filed in Juvenile Court. In the petition Brown prepared, Mother sought custody of A.M.H., but did not request visitation.

On June 6, 2001, the Hes and Mr. Baker appeared for a hearing in Juvenile Court on the Hes' petition for custody. At the outset, Mr. Baker requested that the matter be continued, saying that his lawyer could not be present. Mr. Baker did not inform the Juvenile Court or the Hes that the Bakers' attorney would be preparing and filing a petition to terminate the Hes' parental rights. In accordance with Mr. Baker's request, the Juvenile Court continued the matter until June 22, 2001. However, on June 20, 2001, two days before the scheduled hearing in Juvenile Court, the Bakers filed their petition for termination in the Chancery Court below, which forced the transfer of the Hes' petition for custody to Chancery Court.[5]

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had only Mother sign the petition. Brown had no explanation for this apparent inconsistency, except that she was "fairly new" in her position with Juvenile Court at the time the petition was signed.

[5] Father testified that he and Mother appeared for the hearing on the petition for custody in Juvenile Court on June 22, 2001.

The Hes' actions during the four months preceding the petition, which are not disputed, belie any claim that the Hes' failure to visit A.M.H. during the pertinent four-month period was willful. The Hes' actions certainly did not demonstrate indifference to A.M.H. nor any intent to passively surrender their parental rights. Rather than continue to visit A.M.H., the Hes chose to pursue legal recourse from the Juvenile Court to regain full custody of A.M.H. back from the Bakers. Though a hearing on the Hes' petition had been scheduled in Juvenile Court, the matter was continued at the request of the Bakers. Two days before the postponed hearing was to take place, the Bakers filed their petition for termination in the Chancery Court below, effectively preempting the Hes' efforts to obtain custody. Seeking legal recourse to obtain full custody of the child under these circumstances is a "justifiable excuse" for not visiting during the four months preceding the filing of the petition and, therefore, the Hes' failure visit cannot be found to have been willful.

In a somewhat analogous case from this Court, a biological parent's pursuit of legal recourse during the statutory four-month period was deemed a "justifiable excuse"

They were surprised when they were informed that the case had been transferred to Chancery Court because of the petition for termination and adoption filed by the Bakers.

for not visiting the child during that time. *In re S.M*, 149 S.W.3d 632 (Tenn. Ct. App. 2004). *In In re S.M*, the biological father was from Mexico and had only limited command of the English language. *Id* at 636. He and the child's mother were never married, and after the child was born, the mother placed the child for adoption with a private agency. The mother did not tell this to the father; she told him that the child had died. *Id* at 637. Months later, the private adoption agency contacted the father and, with the aid of an interpreter, told him that his daughter was, in fact, alive and in the agency's custody. The agency rebuffed the father's inquiry about visits and advised him to see a lawyer. Soon thereafter, the father retained a lawyer and filed a petition to establish paternity. *Id* at 638. The agency subsequently filed a petition to terminate the father's parental rights.[6] Later, the father filed a petition to establish

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[6] Actually, the agency had filed a petition for termination prior to the father's filing of a petition to establish paternity. However, the agency also filed two additional petitions for termination after the father filed his petition. The analysis is somewhat complicated by the fact that three termination petitions were filed, making it difficult to identify the four-month period to be considered. *In re S.M*, 149 S.W.3d at 643. The appellate court found that the father obviously was justified in failing to support or visit the child prior to the first petition, because during that four month period, he reasonably believed that the child was dead. *Id*. The discussion herein relates to the appellate court's analysis of the father's conduct during the four-month period preceding the other two petitions

visitation and support, but the agency objected. The trial court ultimately denied the motion to set visitation and support pending a hearing on the agency's petition for termination. The agency later acknowledged that it did not promote the relationship between the father and the child during this time, because doing so would have undermined the planned adoption. *Id* at 643.

After a hearing, the trial court found that the father had abandoned the child by willfully failing to support or visit her during the four months prior to the petition for termination. *Id* at 640. The appellate court reversed, finding that father's failure to support or visit the child during the pertinent period was not "willful" under the circumstances. *Id* This Court described the standard for "willful" failure to support:

> The concept of "willfulness" is at the core of the statutory definition of abandonment. ... Failure to support a child is "willful" when a person is aware of his or her duty to support,

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Brown listed both Mother and Father as petitioners, but she had only Mother sign the petition. Brown had no explanation for this apparent inconsistency, except that she was "fairly new" in her position with Juvenile Court at the time the petition was signed for termination, which were filed *after* the father learned that his daughter was alive.

> has the capacity to provide the support, makes no attempt to provide the support and has no justifiable excuse for not providing the support.

Id at 641-42 (emphasis added). The same standard was applied to the father's alleged willful failure to visit. This Court found that the father had a "justifiable excuse" for failing to support or visit the children because (1) the agency was not promoting the relationship between the father and the child in light of the planned adoption, and (2) the father had "diligently pursued establishing a relationship with [the child] through the courts." *Id* at 643. Thus, the appellate court reversed the termination of the father's parental rights, concluding that his failure to visit or support the child was not "willful" under the circumstances. Id at 643-44.

In this case, the Bakers admit that, during the four-month period prior to the filing of the petition for termination, they did nothing to encourage the relationship between the Hes and A.M.H. in light of their planned adoption of A.M.H. Although the Hes were not in danger of physical harm, it was clear that the status quo had been affected, such that the Hes were no longer welcome to visit at the Bakers' home after the January 28, 2001 incident. Within days after the incident, the Hes took actions in Juvenile Court to pursue custody. As in *In re S.M*, the Hes' pursuit of a legal remedy in Juvenile Court was a "justifiable excuse" for not visiting

during that time. Consequently, as in *In re S.M*, the Bakers have not presented clear and convincing evidence that the Hes' failure to visit A.M.H. was "willful."

Surprisingly, the trial court determined that the failure of the Hes to seek visitation in their petition for custody "evinces [Mother's] willful abandonment of A.M.H." This determination defies logic; the petition did, after all, seek/a// custody of A.M.H., much more than mere visitation.[7] The trial court's finding in this regard is. not questioned, nor even discussed, in the majority opinion. This determination should have been rejected by the majority, because it has no basis in law.

The trial court also based its determination of "willfulness" on its finding that the filing of the Hes' juvenile court petition for custody was motivated by their desire to avoid deportation. As explained below, this finding is not supported in the record, and the majority fails to recognize the lack of evidentiary underpinning for the trial court's holding.

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[7] In its finding, the trial court observed, "It is well-setled that a parent may always petition to have visitation reinstated upon a showing of changed circumstances." The trial court does not explain how the Hes, who were unrepresented, would have known this.

c) Fear of deportation as the Hes' sole motivation for seeking custody

The trial court found that the Hes' pre-January 28, 2001 visits with A.M.H. took place only "to serve the Hes' stated objective to avoid deportation." The trial court also determined that the Hes' May 2000 petition for custody of A.M.H. was filed "for the sole purpose of avoiding deportation" based on "the close proximity of the call from the INS and the filing of the petition." Most importantly, the trial court determined that the Hes' second petition for custody filed within the pivotal four-month period, was also filed "for the sole purpose of remaining in the United States and avoid deportation." The trial court stated that this was "[a]gain, due to the close proximity of the call from the INS and the filing of the petition .... " This finding is the *cornerstone* of the trial court's conclusion that the Hes' failure to visit during the four-month period was "willful," because it is the basis on which the trial court concludes that the Hes' juvenile court petition and their other efforts to obtain custody were mere window dressing and did not constitute a "justifiable excuse" for not visiting. *See In re S.M*, 149 S.W.3d at 643. Rather than setting out in detail the evidence supporting the trial court's conclusion, the majority simply states broadly that "the Hes' desire to avoid deportation has been a consistent theme throughout the tortured history of this case" and defers to the trial court's assessment of the witnesses' credibility.

The majority's treatment of the evidentiary basis for such a crucial finding is, in my view, wholly inadequate. Without a doubt, in its detailed, careful opinion, the trial court stated in the strongest terms its findings on credibility, that Father was deceitful and dishonest, and that Mother was dishonest, manipulative, and theatrical. In contrast, the trial court found the Bakers to be sincere, honest, and credible witnesses. All of these findings are well-supported by the evidence, and the majority rightly accords great deference to the trial court's assessment of the parties' demeanor and credibility. Nevertheless, even deferring to the trial court's credibility determinations, there must be evidence in the record to support the trial court's sweeping conclusion that all of the Hes' visits with A.M.H. and their efforts to regain custody of her, particularly during the pivotal fourmonth period, were done for the sole purpose of avoiding deportation.

The Bakers' attorney sought to establish, through repeated and exhaustive questioning, that the Hes' fear of deportation motivated their conduct, and that their claimed desire to parent A.M.H. was insincere. However, questions from lawyers do not constitute evidence. There are no documents in the record or testimony from an immigration official or anyone else showing when Father was contacted by the INS, or what topics were discussed by Father and any INS official. Rather, the record contains only Father's testimony regarding his communications with immigration officials and

the Hes' fear of deportation. Therefore, we must examine that testimony.

In his testimony, Father admitted that he had been in the United States illegally since he lost his position with the University of Memphis. He admitted that he and Mother feared deportation after he lost his legal status. Father further admitted that he had told immigration officials that he could not leave the United States because he had felony charges (of sexual assault) pending against him, and because there was a pending civil case relating to his daughter. Father was under the impression that, if the criminal charges were dismissed and the litigation concerning A.M.H. were over, he would be deported. As to Mother, Father said that her right to be in the United States was based on her status as legal guardian of their daughter, a United States citizen. At the conclusion of the three-month foster care period, Father told the Bakers that he and Mother wanted to retain their parental rights because of their perception that it would help them remain in the United States.

Father testified in response to repetitive questioning about whether he was contacted by INS officials and when the contacts were made. With respect to the Hes' May 2000 petition for custody, Father was asked whether, "a month or so before that time when you filed that petition," he was "called to INS ... to discuss your status .... " Father acknowledged that

he had been "called by deportation a few times." Then the following colloquy occurred:

> [Bakers' Counsel]: But the first time was in the spring of 2000 about a month before you filed the first Petition to Modify, is it not?
> [Father]: Uh-huh.
> [Bakers' Counsel]: And before that, you did -
> [The Court]: I'm sorry. Mr. Parrish, excuse me. What was his answer?
> [Attorney ad litem interrupts and interjects]: Yes.
> [Father]: My answer is yes, I have been called.

Even assuming that this unclear testimony established the time frame of the INS's call to Father, there is no evidence on the substance of the conversation between Father and the INS official, any issues raised by the official, or how the filing of the petition for custody would have addressed any INS concerns.

As to the Hes' second petition for custody, filed within the pivotal four-month period before the Bakers' petition for termination, Father was questioned by the attorney ad litem, who advocated on behalf of the Bakers' position, consistently pursuing similar lines of questioning as the Bakers' counsel:

[Attorney Ad Litem]: And then you filed the petition, the first one, since you gave custody away, to get custody back; correct? Yes or no?
[Father] : Yes, I filed petition.
[Attorney Ad Litem]: When did you file the second petition?
[Father]: April - April 9,2001.
[Attorney Ad Litem]: Didn't you hear from I.N.S. in March of 2001?
[Father]: I was not sure about the date.
[Attorney Ad Litem]: What do you think?
[Father]: I think it was between March or April or May - between March and May, let's say.
[Attorney Ad Litem]: It was before April the 9th of 2001, was it not?
[Father]: I'm not sure ma'am.

Again, Father's testimony about the timing of the call was uncertain at best, and no testimony was elicited relating to the substance of any conversation between Father and any INS official or any concerns raised by INS.

That is the sum total of the evidence on any alleged nexus between contacts from the INS and the Hes' petition for custody. From this, the trial court made the finding of fact that "[t]he INS contacted Mr. He about the Hes' immigration status in March, April, or May, 2001." The trial court extrapolated

from this evidence that, because the INS contact with Father occurred "around the time" the Hes filed their second petition for custody, then the Hes' fear of deportation was the sale motivation for the May 2001 petition for custody.

The evidence of the "close proximity" between the calls from the INS and the Hes' petition is clearly insufficient. It must be emphasized that the Hes' February 1,2001 letter to Juvenile Court was faxed before any INS contact with Father in March, April, or May 2001. How can the INS call have motivated the Hes' petition for custody if it came after the Hes wrote the Juvenile Court asking for assistance in regaining custody? Notably, in its detailed findings of fact, the trial court makes no mention of the Hes' February 2001 letter to Juvenile Court. Unfortunately, in reviewing the trial court's expansive conclusion that all of these actions by the Hes were done for the sale reason of avoiding deportation, the majority glosses over the evidence, commenting only that the finding is supported because "the Hes' desire to avoid deportation has been a consistent theme throughout the tortured history of this case," and that "the record is replete with instances where the Hes expressed concerns about deportations as it relates to their daughter." Such amorphous description of the evidence does not substitute for analysis. This Court should explicitly set forth the evidence it believes supports the trial court's finding of a nexus between the contacts from the INS and the Hes'

petition for custody, to determine if the finding is adequately supported; the majority has failed to do so on this key issue.

Furthermore, it is undisputed that the criminal charges against Father remained pending until well after the Bakers' petition for termination was filed. Therefore, filing the petition for custody was not necessary for the Hes to be allowed to remain in the United States. Moreover, the Hes' second child, Andy, was born in the United States in November 2000.[8] The birth of their second child, also a United States citizen by birth, made the Hes' retention of parental rights to A.M.H. unnecessary for purposes of remaining in the United States, at least according to the Hes' belief that retaining such parental rights would allow them to stay in the country. These facts undermine any inference that the Hes' filing of a petition for custody of A.M.H. was motivated by their intent to create a legal controversy to serve as a basis on which they could legitimately remain in the United States. There is simply no evidence of how the filing of a petition for custody would have helped the Hes avoid deportation.

It bears repeating that, before the Bakers' petition for termination was filed in Chancery Court, the Hes were in

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[8] The Hes also have a third child, Avita, who was born in the United States in September 2002.

Juvenile Court seeking full custody of A.M.H. Despite this fact, the trial court concluded that, as of the date of the Bakers' petition for termination, the Hes had willfully abandoned A.M.H. by failing to visit her for slightly more than the statutory four-month period. In order to do so, the trial court had to rely on the three most questionable findings in its opinion: (1) that the Hes' agreed-upon once-per-week visitation amounted to token visitation; (2) that the sale reason for the Hes' visits and both petitions for custody of A.M.H. was to avoid deportation; and (3) that failing to include a request for visitation, in addition to the request for full custody, in the second petition showed the Hes' intent to abandon A.M.H. The majority simply accepts these findings with little analysis and concludes that this amounts to "clear and convincing" evidence of willful intent to abandon. I cannot agree .

(d) Lack of knowledge of the consequences of the failure to visit

Regardless of the above considerations, the Hes' parental rights should not be terminated in this case because the Hes did not know that their failure to visit A.M.H. for four consecutive months could result in the termination of their parental rights. If the petition to terminate the Hes' parental rights had been filed by DCS, DCS would have been required to show that the Hes had knowledge that they were obligated

to visit A.M.H. or risk losing their parental rights. The same standard should be applied to the Bakers' petition.

In an opinion issued after the trial court's decision below, this Court held that a parent's failure to visit her child was not willful when the parent did not know that her failure to visit the child for four months could result in the termination of her parental rights. In *In re WE., IV*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618 (Tenn. Ct. App. Apr. 29, 2005), as in the instant situation, DCS was not involved, and the termination petition was filed by the custodians of the mother's child.[9] As background, the biological mother had a long-term addiction to crack cocaine, and the father was in and out of jail for various offenses. The mother feared that her child would be taken from her if she turned to DCS for help, so she accepted assistance from a private ministry established "to keep families together." *In re WE., IV*, 2005 WL 1021618, at * 1-*2. Because the mother had repeatedly subjected the child to unsafe conditions, she agreed to give temporary custody of the child to an associate of the ministry for the stated purpose of allowing

[9] Though the mother had other children involving other fathers, the appeal at issue involved only the youngest of her children, W.E., IV In re WE., IV, 2005 WL 1021618, at *1 n.1.

the mother to obtain long-term treatment for her addiction.[10] *Id* at *3.

The mother in *In re WE., IV* did not complete the rehabilitation program and ended up incarcerated for a short time. Later, after the mother had "borrowed" a car from the ministry associate's husband, the associate filed a dependency and neglect petition against the mother. The mother was brought from the jail in which she was incarcerated to attend the hearing on the petition. The petition was granted, and the Juvenile Court entered an order placing the child in the associate's custody. *Id* at *2. The mother was released from jail shortly thereafter.

Later, the ministry associate became acquainted with a couple who were interested in helping the associate care for the child, and the child began to live with the couple. Eventually, the couple filed a petition for custody of the child, which stated that they "wish to adopt the [child] and plan to proceed with legal proceedings necessary to accomplish this adoption." *Id* at *3. The mother was not told of this transfer of custody. The couple thereafter filed a petition to terminate the mother's parental rights and adopt the children, asserting that the mother

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[10] It was undisputed that the agreement the mother signed relinquishing custody mentioned neither support nor visitation..

had abandoned the children by willfully failing to support or *visit* them for at least four months preceding the petition.

At the time the ministry associate transferred custody of the children to the prospective adoptive family, the biological mother had not visited the children for at least five months. Once the biological mother learned of the transfer of custody, her efforts at making contact were limited to angry telephone calls to the ministry associate. The mother took no legal measures to locate the children or to establish visitation. *Id* at * 1-*4. By the time the prospective adoptive family filed a petition to terminate the mother's parental rights in November 2003, the biological mother had not seen the children for almost ten months. The trial court found that the biological mother had abandoned her children by willfully failing to visit or support them and terminated her parental rights on that ground. *Id.* at *6. The mother appealed.

The appellate court in *In re WE., IV* recognized that the children had not been taken into State custody by DCS, rendering inapplicable the statutes requiring DCS to explain to the biological parent the definition of abandonment and the criteria for termination of parental rights. *Id.* at * 11 (citing T.C.A. § 37-2-403(a)(2) (Supp. 2004)). Nevertheless, the court emphasized, "Mother's knowledge of a duty or expectation that she provide support and visit is a factor in determining willfulness." *Id* The court stated, "Nothing in the record

indicates Mother was informed by anyone that her failure to visit or support the children for four consecutive months could result in termination of her parental rights." *Id* at * 12.[11] On these facts, the appellate court concluded that the evidence did not rise to the level of "clear and convincing" that the mother's failure to visit her children during the four months immediately preceding the filing of the petition was willful.[12]

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[11] The appellate court observed: "It is difficult to understand how Mother could have visited the children while she was unaware of their whereabouts. Of course, she could have taken steps through the courts to find the children and establish visitation." *In re WE., IV*, 2005 WL 1021618, at * 11.

[12] The principle in In re WB., /Fhas precedent under prior law. See *Pierce v. Bechtold*, 448 S. W.2d 425 (Tenn. Ct. App. 1969), in which the biological mother, alone and in financial straits, asked a relative to care for one of her children for an extended time. When the relative later sought to terminate the mother's parental rights and adopt the child, the appellate court observed that persons who are willing to shelter a child under these circumstances

> ... are a boon to unfortunate and abandoned mothers, and their generosity is not expected to hide the trap of abandonment and ultimate loss of parent -child relationship. If there is any such expectation, *the mother is entitled to be put on notice of the peril of accepting such generosity.*

Pierce, 448 S.W.2d at 430 (emphasis added).

In its conclusion, the *In re WE., IV* court stated:

Much of the testimony at trial and much of the trial court's ruling had to do with the children's best interests, *i.e.*, the second prong of the two-part requirement for termination of parental rights. It would be improper for us to determine whether there was clear and convincing evidence that such interests lay in termination of Mother's ... parental rights because of our conclusions that no ground for termination was shown by the constitutionally and statutorily-mandated standard.

Courts are not authorized to terminate a parent's rights only because the children would be better off with such termination. There must first be a showing that a parent has in essence forfeited his or her rights through conduct the legislature has determined constitutes sufficient danger of harm to the child to be made a ground for termination ....

Thus, despite the good intentions of the [prospective adoptive family] to provide a stable and nurturing environment for [this child] by

> adopting [him], our decision cannot be based on the benefits to the children from such an outcome without proof of grounds.

Id at *13 (emphasis added; citations omitted); see ***also In reKC, Jr.***, 2005 WL 2453877, at *10* 11 (no abandonment by failure to support where the mother was not informed that failing to pay support put her parental rights at risk).

Although *In re WE., IV* was decided after the trial court below rendered its decision, its reasoning is applicable here. In any case in which the court is asked to terminate parental rights, the definition of willfulness remains the same, regardless of the involvement of DCS. Indeed, the legislature's designation of DCS as having a duty to inform the biological parent that failure to support or visit could result in the termination of parental rights indicates the legislature's intent that willfulness involve the abrogation of a *known* duty.[13] This supports the

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[13] As noted by the majority, where the State takes custody of a child and places the child in foster care, Tennessee statutes require that the biological parents be informed of the definitions of abandonment and the criteria for termination of their parental rights, such as in the permanency plan developed for the parents. See T.C.A. §§ 37-2-403 (a)(2)(A) & (2)(B)(i) (Supp. 2004). If the child has been taken into State custody, this Court has held that a parent's failure to pay child support may not be deemed willful if DCS did not inform the parent of his duty to

conclusion in *In re WE., IV* that, even if DCS did not take the child into custody, in order to prove willfulness, the petitioner must show that the biological parent had some understanding of the consequences of his action or failure to act.

The majority acknowledges *In re WE.,* /Kand notes that "[t]he parties do not dispute that the Hes never received ... notice" that the failure to visit would result in the termination of their parental rights. However, the majority does not discuss the facts in *In re WE., IV* Rather, it minimizes the holding in that case by characterizing the parents' lack of knowledge as "merely" a factor, and then gives that factor no weight. It is clear that, if the petitioner in this case were DCS, the lack of such knowledge would be fatal to the petition to terminate parental rights.

In this case, it is undisputed that, while attorney Weaver told the Hes that under the consent order arrangement they might have to file a petition in Juvenile Court to regain custody, he did not address the standards for the termination of the Hes'

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provide support, or if the parent was led to believe that the payment of support was not necessary in order to maintain his parental rights. *In re J.J.C. (State v. Calabretta)*, 148 S.W.3d 919,927 (Tenn. Ct. App. 2004); *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *12-*13 (Tenn. Ct. App. Aug. 13,2003).

parental rights and did not inform them that failing to visit A.M.H. could have such a catastrophic result. Father asked Weaver questions about the Hes' opportunity to visit A.M.H., but was not informed that there was in fact an obligation to visit her, lest they lose their parental rights.[14] As in *In re WE., IV*, nothing in this record indicates that the Hes were informed by anyone at any time that their failure to visit for four consecutive months could result in the termination of their parental rights. The Hes' lack of knowledge of the potential consequences of failing to visit is important in determining whether their failure to *visit* during the four-month period was willful.

In comparison, the facts in *In re WE., IV* were considerably more adverse to the biological parent than in the instant case. As we have stated, the mother in *In re WE.*, JF was a long-time crack cocaine addict whose chronic substance abuse led her to endanger the children on numerous occasions, living with the children in unfit conditions, living with various persons, spending support money on drugs, and ultimately leaving the children in a hotel room with an unknown man. The father was also a recovering addict who had felony convictions and several periods of incarceration. By the time the petition to terminate parental rights had been filed, the mother had not seen

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[14] The observation of this fact does not imply that Weaver had a duty, statutory or otherwise, to advise the Hes on the law of abandonment or termination of their parental rights

the children for almost ten months, and her visits prior to that had been sporadic. The mother had taken no legal measures to gain access to her children and had no visible source of income.

Certainly the Hes are not paragons of virtue, and the trial court's finding that they were often dishonest and manipulative is well-supported. However, in contrast to the mother in *In re WE., IV*, the Hes are well-educated with no evidence of substance abuse, and industrious to the point that Mrs. Baker's journal entry criticizes them for "working all the time." There is no evidence that they had ever endangered A.M.H. or her younger brother and sister in the Hes' custody. Unlike the situation in *In re WE., IV*, the Hes visited A.M.H. with regularity until very shortly before the crucial four month period. Furthermore, the Hes initiated legal measures to gain custody of A.M.H. during the four-month period, unlike the mother in *In re WE., IV* Therefore, the factors weighing against the Hes are much less than the factors weighing against the mother in *In re WE., IV*.

The majority in this case dismisses the Hes' lack of knowledge as "merely" a factor to consider in determining whether their failure to visit A.M.H. was willful, even though that same factor was found to be determinative in *In re WE., IV* Row can this disparity be justified? Fairness dictates that parents and petitioners in all termination cases be held to the

same standard, regardless of whether DCS is involved, as this Court recognized in *In re WE., IV.*

In order to sidestep the real problem in its analysis, the majority acts as though the complaint in this dissent is with the legislature. It is not. The statutory definition of "abandonment," i. e., willful failure to visit, is *exactly* the same regardless of whether the petitioner is DCS or a private individual. The real problem lies in the majority's failure to apply the same statutory definition to the Hes, as was done in *In re WE., IV.*

Therefore, for all of these reasons, I disagree with the majority's conclusion that clear and convincing evidence establishes that the Hes' failure to visit A.M.H. during the four months preceding the termination petition was "willful."

III. THE NO-CONTACT ORDER

I also feel compelled to comment on the trial court's February 8, 2002 no-contact order, which prohibited the Hes from having any contact with A.M.H. during the pendency of the litigation. The majority does not address the Hes' argument that the trial court erred in issuing the no-contact order. Given the majority's conclusion, the omission of any analysis on this issue is understandable. In my view, however, the issuance of the no-contact order had a profound effect on the case, and the error in the trial court's ruling in this regard must be recognized.

The majority opinion does a commendable job of explaining the genesis of the no-contact order and the confusion regarding its basis in fact. As outlined in the majority opinion, the issue arose when the Hes initially refused to comply with the trial court's order to turn over A.M.H.'s passport. At the same time, the Hes' attorney had just withdrawn, apparently due to a conflict in representing both Mother and Father simultaneously, and the Res were, therefore, without counsel. The Bakers had made no request for such an order, and the record contains no such recommendation from the guardian ad litem. Apparently, the trial judge at that time, Chancellor D. I. Alissandratos, issued the order in response to a verbal, off-the-record suggestion from the guardian ad litem, prompted by the Hes' refusal to turn over the passport. I can only say "apparently" on the rationale for the order, because there were no pleadings or written recommendations, there was no hearing, and there was no opportunity for the Hes to be heard on the issue. The order simply appears in the record.

When the Hes later retained separate counsel and sought a hearing on the issue, the record was such that Chancellor Alissandratos could neither remember nor reconstruct his reason for issuing the order. He could only surmise that he must have had "a reason" for his decision. Thereafter, the Hes' newly retained attorneys made repeated, vigorous attempts to get a hearing to challenge the nocontact order. All of these attempts were rebuffed for a variety of reasons, even long after the Hes

had turned over A.M.H. 's passport. Finally, by the time the case was reassigned to Judge Childers, the no-contact order had been in effect almost two years. When the issue was raised to him, he quite understandably felt that the best course of action was simply to get the case tried as quickly as possible and, therefore, declined to reconsider the order. As a result, the Hes have never even had a hearing on the issue, and the order remains in effect to this day.

In many cases involving the termination of parental rights, a no-contact order may be necessary for a plethora of reasons where, for example, the biological parents might harm the child, the biological parents have engaged in substance abuse, or there is evidence that the visit upset the child. *See, e.g., Barker v. Barker*, No. W2003-01989-COA-R3-CV, 2004 WL 1908802, at *2 (Tenn. Ct. App. Aug. 23,2004) (noting that Father stipulated that no-contact order was proper based on alleged emotional abuse); *Whitman v. Gifford*, No. 02A01-9206-CC-00172, 1993 WL 54603, at *5-*6 (Tenn. Ct. App. Mar. 3, 1993) (concluding that the trial court did not err in withdrawing a nocontact order, which was based on alleged sexual abuse, when such withdrawal was determined to be in the best interest of the child). This is not such a case. In this case, no evidence of potential harm was presented to Chancellor Alissandratos in support of the no-contact order, nor was any such evidence ever presented to the trial court throughout the proceedings below. Assuming that the order originally arose

from a concern that the Hes, armed with A.M.H. 's passport, would spirit her out of the country, this could have been addressed through supervised visitation, a point made by the Hes' attorneys in their repeated, fruitless efforts to obtain a hearing on the issue.

During the trial, the Hes presented testimony from two psychologists, both of whom were deeply disturbed that the Res had been prevented from having visits with A.M.H. One of the experts, psychologist Dr. John Ciocca, testified presciently that, because the issue before the court was "which relationship will survive," it was important to allow the Hes to have contact with A.M.H. during the pendency of the litigation so as not to "make the decision for the Court in a presumptuous way by allowing [the Hes' relationship with A.M.H.] to die an untimely death." This "untimely death" of the Hes' relationship with A.M.H. was, in my view, the inescapable effect of the no-contact order.

In virtually all cases involving the termination of parental rights, the child has been out of the custody of the biological parent for a significant amount of time. In such cases, the question is not simply who will have custody of the child, but whether the child is better off without the biological parent in her life at all. Therefore, the statute mandates that the court consider whether the parent "has maintained regular visitation or other contact with the child" and whether "a meaningful relationship has otherwise been established between the

parent... and the child." T.C.A § 36-1113(i)(3) - (4) (2005). Here, precluding the Hes from any contact with A.M.H. during the two-year pendency of the case, without ever even affording them an opportunity to be heard, insidiously corrupted the status quo such that a finding that the Hes had not maintained a meaningful relationship with A.M.H. was virtually assured. Thus, even if the Hes' parental rights had not been terminated, the ill-considered no-contact order doomed their petition for custody and effectively preordained the outcome of the litigation. This was clear error.

In sum, I would not only hold that grounds for the termination of the Hes' parental rights have not been established by clear and convincing evidence, I would further conclude that the no- contact order was issued in error and that it should be vacated so that the Hes may have an opportunity to reestablish their relationship with A.M.H.

IV. CONCLUSION

In this case, as in most cases involving the termination of parental rights, the biological parents have numerous liabilities and challenges, and there is powerful evidence that the foster parents will "provide a stable and nurturing environment for [this child] by adopting [her]." *W.B., IV*, 2005 WL 1021618, at * 13. Nevertheless, "our decision cannot be based on the benefits to the children from such an outcome without proof of grounds." *Id* Though it may be tempting in

some cases to focus primarily on the evidence pertaining to the best interest of the child, especially when the adoptive parents are the petitioners and are so prominently involved in the litigation, this Court is "not authorized to terminate a parent's rights only because the children would be better off with such termination." *Id* The termination statutes plainly require there to be clear and convincing evidence of one of the grounds for termination before the best interest of the child can even be considered. No such grounds were proven in this case. I am keenly aware that our decision involves not simply "rights," but the life and well-being of an innocent child. Nevertheless, as a court oflaw, we are not at liberty to apply the statutes as we wish them to be.

To ensure confidence in the fair and consistent application of the law in our judicial system, the Tennessee Supreme Court should address at least one important issue: whether, when a termination petition is filed by a private litigant rather than DCS, the biological parent's rights may be terminated when the parent did not know that failing to support or visit the child for four months could result in the termination of the parent's parental rights. Furthermore, the Tennessee legislature should consider modifying the statutes governing the termination of parental rights to address cases in which DCS is not involved, particularly with respect to the issue of notice.

For the foregoing reasons, I respectfully dissent.

HOLLY M. KIRBY, JUDGE

IN THE CHANCERY COURT OF TENNESSEE
FOR THE THIRTEENTH JUDICIAL DISTRICT
AT MEMPHIS

IN RE ADOPTION OF:
AMH, a Minor,

JERRY L. BAKER and wife,
LOUISE K. BAKER,

Petitioners,

v. No. CH-01-1302-3

SHAIO-QIANG (JACK) HE and
QIN (CASEY) LUO (HE),

Respondents.

MEMORANDUM OPINION and ORDER OF JUDGMENT ON PETITION TO TERMINATE PARENTAL RIGHTS and PETITION TO MODIFY CUSTODY

This cause came on to be heard for trial on February 23, 2004, upon a Petition for Adoption and To Terminate Parental Rights, filed by Jerry L. Baker and wife, Louise K. Baker ("the Bakers"), Petitioners, on June 20, 2001, and also upon a Petition to Modify the June 4, 1999, Consent Order Awarding Custody, filed by Qin Luo (He), Petitioner, in the Juvenile Court of Memphis and Shelby County, Tennessee,

on May 29, 2001. After a careful review of the testimony of each of the witnesses, the trial exhibits, relevant statutory provisions and case law, arguments of the respective counsel for the parties and the guardian *ad litem*, and the entire record in this cause, the Court hereby grants the Petition to Terminate Parental Rights, filed by the Bakers, and terminates the parental rights of Shaio-Qiang (Jack) He and Qin (Casey) Luo He ("the Hes"). The Court also denies the Petition to Modify Custody, filed by Qin Luo (He). Specifically, this Court finds that (1) the Hes willfully abandoned AMH for a period exceeding four (4) months, (2) the Hes provided no support for a period exceeding four (4) months, (3) the Hes only sought custody of AMH to prevent the Hes' deportation, and (4) it would be in AMH's best interest to terminate the Hes' parental rights and to remain with the Bakers. The Court will hold the Bakers' Petition For Adoption in abeyance until the Court's decision on the Petition to Terminate Parental Rights and the Petition to Modify Custody is final.

The Petition to Modify was transferred to this Court pursuant to *Tennessee Code Annotated* § 36-1-116(f)(1). The Court heard testimony from twenty-eight (28) witnesses, from February 23, 2004, until March 2, 2004. The following witnesses testified during the trial: Julie Mize, Michael Lowry, Brandy Hope Baker, Nancy Diane Thorn, Qin (Casey) Luo (He), Rebecca Smith, Louise Baker, Jerry Leonard Baker, Jr., Dr. Yih-Jia Chang, Diane Chunn Brower, Kevin Weaver, Sarah Cloud, Candace Brown, Elizabeth McCord Marshall,

William Webb, Dr. John Copper, Shaio-Qiang (Jack) He, Kenny Yao, Dr. John Robert Hutson, Dr. John Victor Ciocca, John Astor, Larry Parrish, Catherine Claymon, John D. Walt, Kathryn E. Story, Kimbrough Mullins, guardian *ad litem*, Stephanie Johnson, and Dr. David Bruce Goldstein. The Court heard arguments of counsel for the parties regarding several pending motions on March 22-23, 2004, and heard closing arguments of counsel for the parties on April 12, 2004. The Court has made a careful review of the testimony of each of the witnesses, the seventy-nine (79) trial exhibits, relevant statutory provisions, and case law. The Court carefully observed the demeanor of each of the witnesses who testified. The Court has also reviewed the pleadings and the entire record in this cause.

Tennessee Code Annotated § 36-1-113(k) requires the Court to enter an order which makes specific findings of fact and conclusions of law. Termination of parental rights requires clear and convincing proof of one of the statutory grounds for termination and a finding that termination is in the best interest of the child. Clear and convincing evidence eliminates serious doubt[1] and produces a firm belief or conviction as to the truth of the allegations.[2] The Court is

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[1]*Hodges v. s. C. Toof Co.*, 833 S.W.2d 896 (Tenn. 1992).

[2]*O'Daniel v. Messier*, 905 S.W.2d 182 (Tenn. Ct. App. 1995); *Wiltcher v. Bradley*, 708 S.W.2d 407 (Tenn. Ct. App. 1985),

mindful of the great deference that must be given to the constitutionally protected rights of biological parents. Parents, including parents of children born out of wedlock, have a fundamental liberty interest in the care and custody of their child under both the United States and the Tennessee Constitutions. The right to rear one's child is so firmly rooted in our culture that the United States Supreme Court has held it to be a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution.[3]

The Tennessee Adoption Law is set out *in Tennessee Code Annotated* § 36-1-101 *et seq*. The primary purpose of the adoption law is to provide means and procedures for the adoption of children that recognize and effectuate, to the greatest extent possible, the rights and interests of persons affected by adoption, especially those of the adopted persons, which are specifically protected by the United States and the Tennessee Constitutions. To those ends the adoption law seeks to ensure, to the greatest extent possible, among other things, that:

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perm. app. denied, (March 3, 1986).

[3] U.S. Const., Am. 14, § 5; TN Const., Art. 1, § 8; *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993), citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); Dawn Coppock, *Coppock on Tennessee Adoption Law*, (Matthew Bender, 2003), at 46.

(1) Children are removed from the homes of their parents or guardians only when that becomes the only alternative which is consistent with the best interest of the child.

(2) Children are placed only with those persons who have been determined to be capable of providing proper care and a loving home for an adopted child.

(3) The rights of children to be raised in loving homes which are capable of providing proper care for adopted children and that the best interests of children in the adoptive process are protected.

(4) The adoptive process protects the rights of all persons who are affected by that process and who should be entitled to notice of the proceedings for the adoption of a child.

The secondary purpose of the adoption law is, among other things, to protect biological parents and guardians of children from decisions concerning relinquishment of their parental or guardian's rights to their children or wards which might be made as a result of undue influence or fraud.

Based on the witnesses' testimony, the trial exhibits, the arguments of the attorneys for the respective parties and the guardian *ad litem*, the relevant statutory and case law, and the entire record in this cause, the Court makes the following specific Findings of Fact and Conclusions of Law:

I. GENERALLY SIGNIFICANT FACTS

1. Mr. Baker was born September 29, 1958, in Memphis, Tennessee.
2. Mrs. Baker was born July 24, 1961, in North Carolina.
3. Mr. and Mrs. Baker have been married to each other and living together since July 12, 1982.
4. Mr. and Mrs. Baker have four (4) natural born children: two are college age, one is a teenager and one is age four.
5. Mr. and Mrs. Baker have continuously been resident citizens of Shelby County, Tennessee, since February 27, 1993.
6. Mr. Baker was employed by Pinnfund USA, as a mortgage banker, from approximately 1996 to 2001, and earned approximately $435,000.00 during the last year he was employed by Pinnfund. Mr. Baker is a high school graduate and attended college.
7. Since leaving his employment at Pinnfund, Mr. Baker has earned an annual income ranging from approximately $80,000 to $125,000. His earning capacity has been adversely affected by having to

locate new employment, since Pinnfund closed; by having to start over and work his way up through the ranks with a new employer; and by his inability to work at an employment that involves travel because of his concerns and involvement with this cause.

8. Mrs. Baker has been a housewife and mother during the Bakers' marriage and earns a small amount of income by doing babysitting in the Bakers' home. Mrs. Baker has a high school education.

9. Mr. He was born July 18, 1964, in the Peoples Republic of China and has been a citizen of that country since that time.

10. Mr. He first entered the United States from China on a student visa in March 1995, and has continuously resided in the United States since that date, except for a trip to the Peoples Republic of China in May 1998, returning in June 1998.

11. Mr. He received a Masters degree in teaching English as a second language from Hunan University in the Peoples Republic of China in 1988. He taught English at Nanjing University in the Peoples Republic of China from 1988 until 1995 when he came to the United States to further his education. He has been qualified to teach English as a second language to persons who do not speak English since entering the United States in March 1995. He pursued a Masters degree in English as a second language at Arizona

State University from 1995 to 1997. He finished his course work for the Masters degree, but he did not have the opportunity to defend his thesis and obtain his degree because he came to the University of Memphis in August 1997. He enrolled at the University of Memphis in August 1997 to pursue a Doctor of Philosophy degree in economics. He did not finish his course work for his Ph.D in economics because he switched his course of study to obtain a Masters degree in Management Information Systems at the University of Memphis. He finished his course for his Masters degree in Management Information Systems in 1998, but he did not receive his degree.

2. Mrs. He was born on March 21, 1968, in the People's Republic of China and has been a citizen of that country since that time. She entered the United States on June 28, 1998, and she has resided in the United States since that date.

3. Mrs. He does not speak or understand English proficiently and was provided qualified translators of her choice throughout the proceedings in this cause. At times during the trial Mr. He acted as Mrs. He's translator, by agreement of Mrs. He. Mrs. He remained aware of what transpired during the trial from those translators.

4. On June 28, 1998, Mrs. He was allowed entry into the United States on a F-2 visa, as the wife of a student on

a F-1 student visa. Because she and Mr. He falsely represented to the United States Government that they were married to each other in the Peoples Republic of China; she has been in this country illegally.

15. Since September 1999, both Mr. and Mrs. He have had no legal right to remain in the United States and have been subject to deportation from the United States to the Peoples Republic of China.

16. Although both of the Hes have been employed and have earned income while in the United States, neither of the Hes can earn income legally while remaining in the United States because of their immigration status as illegal aliens.

17. Mr. He was arrested for sexual assault on April 27, 1999.

18. Mr. He was acquitted of the sexual assault charge in February 2003.

19. AMH was born out of wedlock on January 28, 1999, and AMH's birth parents are Shaio- Qiang (Jack) He and Qin (Casey) Luo.

20. Mr. He questioned whether he was the biological father of AMH and requested that the *guardian ad litem* arrange blood testing for Mr. He, Mrs. He, and AMH to determine paternity of AMH.

21. Mr. He filed an acknowledgment of paternity on March 15, 2002.

22. Shaio-Qiang He and Qin Luo were legally married in Memphis, Shelby County, Tennessee, on January 7, 2002.

23. By virtue of being born in the United States, AMH is a citizen of the United States.

24. AMH has resided in Shelby County, Tennessee, since AMH's birth on January 28, 1999.

25. AMH is a normal, healthy five-year-old child.

26. The Bakers have had legal custody and guardianship of the person of AMH continuously since June 4, 1999. On June 4, 1999, the Hes filed a petition to transfer custody of AMH to the Bakers and signed a Consent Order Awarding Custody, which was entered by the Juvenile Court of Memphis and Shelby County, Tennessee.

27. The Consent Order Awarding Custody mandated the Bakers to be the legal custodians and guardians of the person of AMH and entitled the Bakers, as a matter of right, to the physical custody of AMH, the right to determine the nature of the care and treatment of AMH, including ordinary medical care, and the right and duty to provide for AMH's care, protection, training, and education, and AMH's physical, mental, and moral welfare.

28. Since June 4, 1999, the Bakers have undertaken and performed their duties and responsibilities as AMH's legal custodians and guardians.

29. All parties, including Mr. and Mrs. He, knowingly and voluntarily signed the June 4, 1999, Consent Order Awarding Custody, without being induced by any fraud or undue influence.

30. Attorney Kimbrough Mullins was appointed to act as guardian *ad litem* for AMH, by consent of both the Bakers and the Hes, by order dated July 24, 2000.

31. The Hes, the Bakers, and the guardian *ad litem* participated, by agreement, in mediation through the Christian Conciliation Service of the Second Presbyterian Church in 2002, but the mediation did not result in a resolution of this matter.

II. LITIGANT CREDIBILITY

The Court has carefully scrutinized the testimony of the Hes and the Bakers. Because they have an interest in the outcome of the case, the reliability of their testimony has been viewed in relation to other evidence and the entire record in this cause, for corroboration and/or inconsistency and the Court has weighed their testimony accordingly.

The Court observed Mr. Baker testify for approximately three (3) hours of live testimony at trial. Mrs. Baker testified for approximately five (5) hours of live testimony at trial. Mrs. He testified for approximately ten (10) hours of live testimony at trial. Mr. He testified for approximately seven (7) hours of live testimony at trial. The

Court also observed Mr. He testify for approximately six (6) hours, by a video-tape deposition that was admitted as Trial Exhibit 20.

The Court was physically present with the Bakers and the Hes in the courtroom for over ninety-one (91) hours of trial testimony, over fifteen (15) hours of arguments on motions after the conclusion of the proof, and six (6) hours of closing arguments. The Court observed each of them throughout the trial proceedings and interacted, through counsel, with them as the trial proceeded to conclusion. The Court makes the following findings of fact regarding credibility of the witnesses:

32. Mr. Baker impressed the Court as a man who has a great deal of love, care, and concern for children in general, but who has an enormous amount of love, care, and concern for his own natural born children and for AMH. He testified in an honest, straightforward, sincere manner. Mr. Baker impressed the Court with his sincerity and the concern he expressed for AMH's welfare and safety. Mr. Baker has demonstrated concern for and a willingness to help others who are in need, including the Hes. As one example, Mr. Baker helped Mr. He when Mr. Hes' vehicle was in the shop for repairs.

33. Mrs. Baker impressed the Court as a sincere, honest, credible witness. She too has demonstrated that she has a great deal of love, care, and concern for children

in general, but she also has an enormous amount of love, care, and concern for her own natural born children and for AMH. Mrs. Baker also impressed the Court with her care and concern for AMH's welfare and safety. Mrs. Baker has demonstrated concern for and a willingness to help others who are in need, including the Hes. For example, she took Mrs. He to obtain social services and to apply for Tenn Care insurance coverage for the Hes' second child, Andy, who was born in October, 2000. She took Mrs. He and Andy home from the hospital after Andy's birth. She loaned the Hes a baby bed for Andy. She went to the Hes' apartment to show Mrs. He how to feed, burp, bathe, and change Andy's diapers. She took Andy to the doctor's office because Mr. He was too busy, and she took Andy to other appointments because Mrs. He was too busy.

34. Both of the Bakers demonstrated their concern and care, and lack of any animosity toward the Hes, by foregoing their church and other regular activities to accommodate the Hes' visits with AMH. The Bakers also served the Hes dinner on several of their visits, and allowed the Hes to bring friends with them to the Bakers' home for visits, serving the friends dinner as well. On one occasion, the Bakers gave Mr. He a birthday card and a gift certificate to a restaurant for his birthday.

35. Mr. He is highly educated, both in the Peoples Republic of China and in the United States, and exhibits a high level of intelligence. He has demonstrated that he also has a high level of knowledge of the culture in the United States, that he is familiar with the justice system in Shelby County, Tennessee, and that he is proficient in his knowledge and use of the English language. He is proficient in computer skills, including the ability to access the Internet and to use website technology to garner resources and seek assistance from experts. He has an aggressive personality and shows no propensity to be deterred or intimidated. He is a thoughtful and deliberate person who exhibits a proclivity to calculate, plan, and carefully predetermine his action and behaviors. At all times relevant to this case, Mr. He has demonstrated the ability to access knowledgeable advisors in any area in which he needs assistance, to scrutinize the advice given, and, if dissatisfied with the advice, reject the advice and seek out other advisors.

36. Since 1998, Mr. He has repeatedly engaged in a pattern of conduct marked by deceitfulness and dishonesty, without remorse, repentance, or conscience, and has shown a propensity to justify all means, including perjury, for what M r. He deems to be justifiable ends.

37. Mr. He admitted that he lied about his income, under oath, in his December 20, 2001, deposition and that he said things that he knew were not the truth. During his deposition, Mr. He also knowingly and willfully gave false testimony with respect to material facts concerning his and Mrs. He's assets. The Court has previously found that Mr. He committed perjury while under oath in Court hearings and pleadings filed in this cause.

38. The Court reaffirms and incorporates herein by reference the findings made by the Court relative to the perjury of Mr. He in testimony given before the Court on February 14, 2002, as memorialized in the February 22, 2002, order entitled "Judgment On Order To Show Cause Pertaining To Passport" and the order entitled "Judgment On Order To Show Cause Pertaining To Documentation Of Marriage In The Republic Of China."

39. The evidence also shows that Mr. He tried to procure an F-2 visa, in 1997, for another Chinese woman, who Mr. He claimed was his wife. Mr. He later admitted that this woman was not his wife and that he had committed a fraud on the University of Memphis.

40. Mr. He made material false statements on a loan application, dated October 18, 2001, relative to his employment, his income, his status as a student, and

his personal references for the purpose of securing a loan for the purchase of a new vehicle.

41. Mr. He first entered the United States on a F-1 Student visa which allowed him to be employed and earn income. However, after he was suspended by the University of Memphis on September 20, 1999, and his student visa was revoked, Mr. He was not legally permitted to be employed and earn income in the United States. Nevertheless, Mr. He has been employed and earned income in the United States, since September 20, 1999, and has failed to report his income to the Internal Revenue Service, thus defrauding the United States government.

42. Mrs. He is an impetuous person not subject to being intimidated or deterred in achieving whatever she sets as her goal. The evidence shows that she is calculating, almost theatrical, in her actions. The evidence further shows that she is dishonest and manipulative, and has a history of acting in an unstable manner when it serves her own self-interest. For example, during cross-examination, Mrs. He would begin sobbing when asked difficult questions. However, Mrs. He would immediately regain her composure when asked subsequent questions. It appears to the Court that Mrs. He's courtroom hysterics were calculated by Mrs. He in an effort to

avoid answering the difficult cross-examination questions.

43. Though Mrs. He speaks sufficient English to carry on her daily affairs in the United States, she is not as proficient as Mr. He in knowledge or use of the English language and, unlike Mr. He, sometimes needs assistance with translation in technical or extraordinary use of the English language. She has confidence in Mr. He, prefers Mr. He as her translator, has no desire to part company with Mr. He for any reason and intends to cooperate fully with Mr. He to remain together with him as a family and believes Mr. He has never failed to keep her fully and honestly informed about the legal matters involving AMH.

44. Although Mrs. He does not speak the English language fluently, she appears to speak and understand English better than she professes. For example, Mrs. He spoke English during some of the Hes' visits with AMH at the Bakers' home and when Mrs. He took the Hes' other children for medical treatment. She also spoke English during the incident when she was holding a sign outside of the Bakers' home, and the Bakers' neighbor, Rebecca Smith, asked Mrs. He to move her car, and she spoke English during the December 2003, incident at the Wal~Mart store. During the trial, in response to a question from attorney Linda Holmes, Mrs. He responded to the

question by speaking in English, before the interpreter had begun interpreting Ms. Holmes' question to Mrs. He. Mrs. He said, "Mr. Parrish filed legal motion," then she stopped speaking English and began responding to the question in Chinese.

45. Mrs. He admitted signing a document in the Peoples Republic of China that falsely stated that she and Mr. He were married for the purpose of obtaining a visa allowing her to come to the United States.

46. Although the Hes were not married at the time, Mrs. He entered the United States illegally, in 1998, on a F-2 visa, as the wife of a person in the United States on a student visa, despite the fact that she indicated that she was single, not married, on AMH's birth certificate.

47. Because of her status as an illegal alien, Mrs. He was not legally permitted to be employed and earn income. Nevertheless, Mrs. He has been employed and earned income in the United States throughout most of her stay, but has failed to report her income to the Internal Revenue Service, thus defrauding the United States government.

48. Mrs. He only seems to be interested in regaining custody of AMH when deportation seems imminent. This fact is evidenced by Mrs. He filing the two (2) petitions to modify custody in close proximity to receiving calls from the United States Immigration &

Naturalization Service ("INS"), regarding Mr. and Mrs. Hes' immigration status.

49. From the totality of the credible proof at trial, both Mr. and Mrs. He have shown themselves to be persons who do not consider themselves to be bound by the rule of law. Mr. and Mrs. He have demonstrated that they will do and say anything in order to achieve their desired goals.

III. CREDIBILITY OF OTHER WITNESSES

50. Dr. John Copper testified for the Hes during the trial as an expert in Chinese culture, to explain the H es' conduct. Dr. Copper testified that in China telling a falsehood about family matters would be bad, but telling a falsehood to the government would not be as bad. The Court finds Dr. Copper's testimony to be totally lacking in credibility. The Court agrees with the findings of the United States Bankruptcy Court for the Western District of Tennessee, in its October 31, 2003, Memorandum Opinion, which was entered into evidence as Trial Exhibit 26, that Dr. Copper's testimony is unbelievable, and totally lacking in credibility. The Court further finds that Dr. Copper is not an expert in Chinese adoption law, nor is he an expert on termination of parental rights.

51. Dr. Yih-Jia Chang testified as an expert witness on behalf of both Mr. and Mrs. He. The Court has previously ruled that the underlying facts or data relied upon by Dr. Chang in forming her opinion regarding Mrs. He's mental health indicate a lack of trustworthiness, and excluded Dr. Chang's testimony as to Mrs. He.

52. Dr. Chang testified, as to Mr. He, that she based her opinion about Mr. He's mental health on her clinical evaluation, mental status examination, and the MMPI test results. Dr. Chang testified that her clinical evaluation and mental status examination of Mr. He were based on questions she asked of, and responses given by, Mr. He. The Court finds the credibility of Mr. He to be seriously lacking; therefore, the opinions given by Dr. Chang, based on Mr. He's credibility, are entitled to no weight.

53. David B. Goldstein, Ph.D. ("Dr. Goldstein"), was appointed by the Court to serve as the court-appointed expert to advise the Court concerning the psychological evaluation of AMH. Dr. Goldstein was appointed by the Court upon the recommendation of the guardian *ad litem* and with the consent of the Bakers and the Hes. Initially, Dr. Goldstein was requested to conduct a psychological evaluation of AMH; however, the Court later, on February 12, 2002, expanded the evaluation to include the Bakers

and the Hes, to the extent that Dr. Goldstein deemed necessary to prepare the psychological report concerning AMH. Dr. Goldstein ultimately determined that he could not conduct an evaluation of the Bakers and the Hes because Dr. Goldstein was concerned that his evaluating AMH, the Bakers, and the Hes might present a conflict of interest, since he was not conducting strictly a custody evaluation, but an evaluation dealing with the possible termination of parental rights. Dr. Goldstein was also concerned that he was not qualified to conduct an examination of the Hes because of the language barrier.

54. Dr. Goldstein served the Court and provided the Court with his opinion, without any interest in the outcome of the cause and without representing the interests of either the Hes or the Bakers. Dr. Goldstein provided the Court with the benefit of his expertise regarding AM H's psychological well-being, and the possible affects on AMH of remaining with the Bakers and having contact with the Hes ended, or placing AMH with the Hes, and having contact with the Bakers ended.

55. The Court finds Dr. Goldstein to be a highly qualified, highly respected, experienced psychologist, who has been practicing in the Memphis, Shelby County, Tennessee, area for many years. The majority of Dr. Goldstein's training has been in the area of child

psychology. Dr. Goldstein was diligent and thorough in his examination and evaluation of AMH and AMH's attachment with the Bakers, and with his evaluation of AMH's reaction to AMH's visit with the Hes in Dr. Goldstein's office, on September 23, 2003. Dr. Goldstein evaluated AMH over a period of several months. Dr. Goldstein has shown no bias or prejudice in the performance of his duties or in his testimony, but gave the Court his honest opinion, based on his clinical evaluation of AMH, his research, and his years of experience. The Court found Dr. Goldstein to be a very knowledgeable, honest and forthright witness.

56. Dr. John Robert Hutson is a highly qualified, highly respected, experienced psychologist, who has practiced in the Memphis, Shelby County, Tennessee, area for many years. Dr. Hutson never personally interviewed or evaluated AMH, so his testimony was limited to that which he observed on the videotaped session with the Bakers, the Hes, and AMH in Dr. Goldstein's office on September 23, 2003, and his experience as a psychologist. Dr. Hutson's testimony was of little assistance to the Court.

57. Dr. John Victor Ciocca is a highly qualified, highly respected, experienced psychologist, who has practiced in the Memphis, Shelby County, Tennessee, area for many years. Dr. Ciocca never personally

interviewed or evaluated AMH, so his testimony was limited to that which he observed on the videotaped session with the Bakers, the Hes, and AMH in Dr. Goldstein's office on September 23. 2003, and his experience as a psychologist. Dr. Ciocca had no opinion as to the level of AM H's psychological attachment to the Bakers or the Hes. Dr. Ciocca's testimony was of little assistance to the Court.

58. The guardian *ad litem*, Ms. Kimbrough Mullins, is a skilled attorney who has served the courts in Shelby County, Tennessee, as a guardian *ad litem* for the past fifteen (15) years. Ms. Mullins has served the Court, and represented and advocated AMH's best interests, to the best of her ability, in an exemplary manner, under very difficult circumstances. Ms. Mullins, in her fiduciary capacity to AMH and to the Court, has acted in good faith, has shown no bias or prejudice in the performance of her duties, but has steadfastly and diligently advocated for what Ms. Mullins considers to be in AMH's best interest, regardless of the consequences, based solely upon the information she gathered during her investigation. The Court found her to be an honest and forthright witness.

59. Kevin Weaver has been an attorney practicing in Memphis, Shelby County, Tennessee, for nineteen (19) years. For the last eleven (11) years he has practiced primarily adoption law. His practice consists

of approximately 75 to 80% adoption cases. During 2003, Mr. Weaver finalized over one hundred (100) adoption cases. He has lectured and taught adoption law to other attorneys. The court finds that Mr. Weaver is an expert in the area of adoption law. The Court finds that Mr. Weaver was a credible witness.

60. Julie Mize, Michael Lowry, Nancy Diane Thorn, Rebecca Smith, Diane Chunn Brower, Sarah Cloud, Candace Brown, Kenny Yao, John Astor, John D. Walt, Kathryn E. Story, and Stephanie Johnson, all testified during the trial of this cause. Each of these witnesses testified honestly and without bias. The Court finds each of these witnesses' testimony to be credible.

IV. DUE PROCESS CLAIMS

61. Both before and after June 4, 1999, the Hes had an ongoing relationship with John Walt, an experienced attorney practicing for many years in Memphis. Mr. Walt advised and interacted with Mr. He, as an outreach ministry without pay, to assist Mr. He with legal issues associated with sexual assault charges being pressed by the University of Memphis and by the State of Tennessee. Mr. Walt advised Mr. He that the outcome of said charges would be determinative of Mr. He's status as a student at the University of

Memphis and his status as a legal alien in the United States. Mr. Walt met with Mr. He on five (5) or more occasions to advise Mr. He on the charges made by the University of Memphis and also to assist Mr. He in obtaining an attorney to represent Mr. He on the criminal charges brought by the State.

62. Although Mr. Walt was available to advise Mr. He about AMH's custody, Mr. He never made any mention of AMH to Mr. Walt, nor of the difficulties the Hes were having regarding custody of AMH.

63. Both before and after June 4, 1999, the Hes engaged the services of at least two attorneys in Memphis, Ms. Dell Stiner and another un-named attorney, to advise and represent the Hes in civil litigation arising from physical injuries Mrs. He allegedly sustained in November 1998. The Hes also spoke to another attorney that Ms. Chunn referred them to, Mr. Parke Morris, about the civil litigation. Neither of the Hes ever mentioned to any of these three attorneys the need for representation or advice regarding placing or regaining custody of AMH.

64. Both before and after June 4, 1999, Mr. He engaged the services of at least three attorneys to advise him and represent him in defense of the criminal charges brought by the State: Mr. AC Wharton, Mr. Stephen Sauer, and Mr. James Hodges, Jr. Mrs. He accompanied Mr. He on many occasions when Mr. He

met with these attorneys. Neither of the Hes ever mentioned to any of these attorneys any need for representation or advice relative to AM H's custody. In fact, the Hes never even told these three attorneys about the existence of AMH.

65. Mrs. He testified that she sent her younger son, Andy, to the Peoples Republic of China because Mr. Hes' criminal attorney, AC Wharton, told Mrs. He that "they" would take the Hes' son and put him up for adoption if Mr. He did not agree to accept the guilty plea offer on Mr. He's criminal charge. Neither of the Hes ever mentioned to Attorney Wharton that they also had an older child (AMH), or that they were having difficulty regaining custody of AMH.

66. Although Mr. and Mrs. He had numerous opportunities, neither of them ever sought the advice of any of the above-mentioned attorneys, never discussed the issue of the Hes giving up custody or of regaining custody of AMH, and never mentioned to any of these attorneys that the Hes had a child.

67. On June 2, 1999, attorney Kevin Weaver met with Mr. He and the Bakers and fully advised Mr. He and the Bakers of the legal ramifications of filing a petition for custody and of signing a consent order awarding custody of AMH. Mrs. He, after being fully advised of the meeting and of the purpose of the meeting by Mr. He, waived her right to be present at

the meeting and told Mr. He to tell the others at the meeting that she was ready to proceed. Mr. Weaver answered all of Mr. He's and the Bakers' questions during the meeting. Mr. He later advised Mrs. He of the information that Mr. Weaver imparted at the meeting.

68. On June 3, 1999, Ms. Chunn and Mr. Kenny Yao, an experienced interpreter in English and Mandarin Chinese, met with Mrs. He, alone, in the Hes' apartment. Ms. Chunn wanted to make certain that Mrs. He understood what she would be doing if Mrs. He signed a consent custody order, and whether Mrs. He was one hundred percent willing for a transfer of custody of AMH from the Hes to the Bakers. Ms. Chunn explained to Mrs. He the things that Kevin Weaver had said to Ms. Chunn, the Bakers, and Mr. He, the day before in the meeting in Mr. Weaver's office. Mrs. He indicated that she understood everything that Ms. Chunn had told her through Mr. Yao. Mrs. He asked no questions of Ms. Chunn, through Mr. Yao.

69. On June 4, 1999, Ms. Sarah Cloud, with the assistance of a qualified interpreter, privately met with Mrs. He, without Mr. He, and fully explained the legal ramifications of both the Petition For Custody and the Consent Order Awarding Custody, both of which Mrs. He later voluntarily signed.

70. The Hes were familiar with the Juvenile Court for Memphis and Shelby County, Tennessee, before June 4, 1999, because they had sought the services of the Juvenile Court on or about February 23, 1999, when they spoke to Ms. Sarah Cloud about long-term foster care through the State of Tennessee Department of Childrens Services. Although the Hes had consulted with attorneys in the past regarding other legal matters, the Hes never inquired at Juvenile Court about getting an attorney to provide the Hes legal advice concerning the original transfer of custody of AMH.

71. A few months after the Hes signed the June 4, 1999, Consent Order Awarding Custody, the Hes went to the Juvenile Court and spoke with Ms. Cloud about getting assistance to file a petition to regain custody of AMH. Ms. Cloud directed the Hes to the appropriate Juvenile Court office to speak to a counselor, who would assist the Hes with filing a petition to modify custody and with putting the petition on the court docket for a hearing. Ms. Cloud advised the Hes that they should hire an attorney for legal advice and representation, and Ms. Cloud recommended the services of the Memphis Area Legal Services, if the Hes could not afford to hire an attorney.

72. Both Mr. and Mrs. He had many opportunities to obtain legal advice, and did receive legal advice from

attorney Kevin Weaver, about their decision to petition the Juvenile Court to place custody of AMH with the Bakers, before the Hes signed the petition and consent order.

73. There was no law, rule, regulation, fraud, duress, undue influence, or trickery which caused the Hes, at the outset, to petition the Juvenile Court to give legal custody of AMH to the Bakers.

74. The evidence establishes that there was no conspiracy to deprive the Hes of their right to due process or to the custody of AM H.

75. Ms. Sarah Cloud, Ms. Diane Chunn, Mid-South Christian Services ("Mid~South"), Mr. Kenny Yao, Mr. Kevin Weaver, Ms. Kimbrough Mullins, Ms. Linda Holmes, Dr. David Goldstein, Ms. Kathryn Story, and Mr. Larry Parrish played no part, individually or in concert or conspiracy with any other persons, to encourage, discourage, or facilitate, at any time: (1) the denial of either of the Hes' legal rights or entitlements; (2) the Hes' filing of a Petition for Custody in Juvenile Court on June 4, 1999, seeking to place AMH's custody with the Bakers; (3) the Hes' signing the June 4, 1999, Consent Order Awarding Custody of AM H to the Bakers; or (4) the Bakers' decision to file a petition to adopt AMH and to terminate the Hes' parental rights.

76. The first time the Bakers considered the idea of adopting AMH was in May 1999, when the Hes suggested to the Bakers that the Hes wanted the Bakers to adopt and raise AMH.

77. The Bakers did not consider the idea of adopting AMH again until attorney Kevin Weaver explained to the Bakers that they had a right to file a petition to adopt AMH and to terminate the Hes' parental rights, after the Hes signed the first Petition to Modify custody in Juvenile Court on May 3, 2000.

78. The Bakers did not decide to file a petition to adopt and terminate parental rights until after being served with the Hes' second Petition to Modify custody, filed in Juvenile Court on May 29, 2001. The Bakers sought legal advice of Mr. Weaver and then decided to file a petition to adopt AMH and terminate the Hes' parental rights.

79. The Bakers' decision to file a petition to adopt and to terminate the Hes' parental rights was made exclusively by the Bakers, alone, and was not made in concert or conspiracy with any other person or persons.

V. ABANDONMENT FACTORS

A. Chronology of Events

80. The Hes initiated the first contact with Mid-South Christian Services ("Mid-South") through a referral from one of the Hes' church members. Dianne Chunn ("Ms. Chunn") first met with the Hes while acting in her capacity as a birth-parent counselor for Mid-South on or about November 1, 1998. The Hes told Ms. Chunn that Mrs. He was pregnant and they wanted to place the unborn child for adoption. As a result of the first meeting with Ms. Chunn, the Hes completed a "pregnancy counseling status sheet" providing Mid-South basic information about the Hes, including that Mr. and Mrs. He were husband and wife.

81. On or about December 1, 1998, Mid-South formally opened a "birth-parent file" relating to the Hes and the adoption. As a birth-parent counselor for the Hes, Ms. Chunn's responsibilities were to provide ongoing counseling to the birth parents so the Hes could work through the pros and cons of adoption. As a part of her counseling, Ms. Chunn let the Hes review several profiles of prospective adoptive parents. The Hes selected a prospective adoptive couple and, pursuant to the Hes' request, Ms. Chunn arranged a meeting with the Hes and that couple to discuss the possibility of adopting AMH.

82. On January 9, 1999, Ms. Chunn met with Mr. He at the hospital because Mrs. He had been hospitalized for vaginal bleeding, allegedly caused by an assault on Mrs. He. Mr. He told Ms. Chunn that Mrs. He felt "cheated" because the prospective adoptive family that the Hes met with on December 1, 1998, were not wealthy, as was the Hes' request. Mr. He told Ms. Chunn that the Hes felt that the prospective adoptive family should be "taking care of them" during the birth process, that is, the family should be visiting the Hes and bringing nutritious food and other things for the Hes. The Hes did not go through with the adoption to the family they had first selected to adopt AMH because Mrs. He thought that family was not wealthy enough and was too young.

83. On January 19, 1999, Mr. He asked Ms. Chunn to write a letter to the University of Memphis to advise university officials that the Hes were not prepared financially or emotionally to be parents at that time.

84. After AMH's birth on January 28, 1999, AMH experienced respiratory distress, which required AMH to remain in the hospital's neonatal intensive care unit for eleven days. After AMH's birth, Mrs. He changed her mind about giving AMH up for adoption, even though the Hes had already selected parents to adopt AMH and accepted gifts from them. Mrs. He informed Ms. Chunn of her decision. After AMH was

discharged from the hospital on or about February 8, 1999, the Hes took AMH home to their apartment. Approximately two (2) days later, Ms. Chunn visited with the Hes and AMH in their apartment. The Hes explained to Ms. Chunn that they were having severe financial difficulties, and Ms. Chunn and the Hes discussed the possible need for the services of the Tennessee Department of Childrens Services (DCS) to provide long-term foster care. Ms. Chunn explained to the Hes that Mid-South was unable to provide long-term foster care for AMH.

85. On February 10, 1999, Ms. Chunn met again with the Hes and AM H in their apartment. Mr. He told Ms. Chunn that he had to borrow money for the Hes' living expenses for the coming month, and was unsure where money for their future living expenses would come from. Mrs. He felt that the Hes would get additional money for future expenses from the lawsuit that the Hes were planning to file for personal injuries she sustained from the alleged assault on her.

86. On February 22, 1999, Mr. He called Ms. Chunn and told her that the Hes were still considering placing AMH for adoption. Ms. Chunn met with the Hes on February 23, 1999, and discussed adoption and long-term foster care.

87. On February 23, 1999, the Hes went to the Juvenile Court with AMH and talked with Ms. Sarah Cloud

about placing AMH in long-term foster care with DCS. The Hes told Ms. Cloud that they had been talking with Ms. Chunn at Mid-South about their inability to take care of AMH. Ms. Cloud then called Ms. Chunn, who told Ms. Cloud that the Hes initially wanted to place AMH for adoption, but changed their minds and now wanted to place AMH in foster care. Ms. Chunn told Ms. Cloud that Mid-South could not provide long-term foster care for AMH, and that the Hes would have to go to DCS if the Hes needed long-term foster care for AMH. After her conversation with Ms. Chunn, Ms. Cloud suggested that the Hes consider placing AMH in shorter-term foster care to give the Hes an opportunity to decide whether they would be able to take care of AMH in the future or whether they would want to place AMH for adoption. Ms. Cloud suggested that the Hes return to Ms. Chunn to determine if Mid-South could provide interim foster care for AMH, while the Hes decided what they wanted to do with AM H.

88. On February 24, 1999, the Hes delivered AMH to Mid-South and signed an agreement requesting that Mid-South take AMH into foster care for ninety (90) days.

89. The Bakers, who were the next family on the Mid-South foster care list, were asked by Mid-South to serve as foster parents of AMH for ninety (90)

days, from February 24, 1999, through May 23, 1999, in order to give the Hes time to decide either to place AMH for adoption or to undertake the responsibility to support and care for AMH. Ms. Chunn and the Hes went to the Bakers' home with AMH on February 24, 1999. Ms. Chunn introduced the Hes to the Bakers, and the Hes and Ms. Chunn gave physical custody of AMH to the Bakers, pursuant to the foster care agreement.

90. Mid-South has had a relationship with the Bakers since 1997. The Bakers were on Mid-South's list of persons who are qualified and willing to serve as foster parents to children in Mid-South's custody, who are awaiting adoption. The Bakers began keeping foster children for Mid-South in 1997. The Bakers usually kept a foster child for seven to ten days, while the adoption of that child was being processed. The Bakers agreed to an extended foster care period for AMH because the Bakers had always accepted the children that Mid-South offered, and because the Hes needed a three (3) month period of time to decide whether they wanted to keep AMH or to give AMH up for adoption.

91. The Bakers were not under consideration as prospective adoptive parents for AMH on February 24, 1999, as the Has had previously selected another prospective adoptive family. Prior to February 24,

1999, the Bakers had made a deliberate decision that they had no interest in adopting any children, and in furtherance of that decision, Mrs. Baker had surgery in August 1998, to reverse an earlier tubal ligation, in order to make it possible for the Bakers to give birth to another child of their own.

92. AMH has been in the Bakers' physical custody since February 24, 1999, when AMH was twenty-seven (27) days old.

93. The Hes made their decision concerning the care, custody, and control of AMH. No one forced the Hes to relinquish care, custody, and control of AMH to Mid-South Christian Services, or to the Bakers. The Hes voluntarily exercised their fundamental right as parents to transfer custody of AM H to the Bakers.

94. During the ninety-day foster care period, February 24, 1999, to May 23, 1999, the Hes visited in the Bakers' home for approximately one (1) hour each week, a total of approximately twelve (12) hours during the first three months of AMH's life. During this period, neither the Bakers nor Mid-South placed any restrictions on the frequency or duration of the Hes' visits in the Bakers' home. The Hes never requested to visit AMH more frequently or for longer periods during the ninety-day foster care period. During the ninety-day foster care period, the Hes were free to

terminate the foster care agreement with Mid-South and to regain full legal and physical custody of AMH.

95. On March 8, 1999, the Hes visited with AMH in the Bakers' home with Ms. Chunn present. Mr. He told Ms. Chunn that Mrs. He would readily agree to adoption if the adoptive couple would allow weekly visits until Mrs. He became pregnant with another child. Mr. He also told Ms. Chunn that, according to Chinese superstition, AMH was less than an ideal child because of AMH's difficult birth. On March 30, 1999, Mr. He spoke with Ms. Chunn again about the possibility of adoption; he told Ms. Chunn that Mrs. He was comfortable with adoption, but Mrs. He wanted to maintain parental rights of AMH so she could remain in the United States.

96. In mid-April 1999, the Hes applied for a passport for AMH. The passport was issued May 1, 1999. The Hes looked for someone with a green card to take AMH to China at the end of the ninety-day foster care period, but they were unable to find a suitable person, so the Hes decided on the Bakers to take care of AMH.

97. The Bakers knew that the Hes intended to secure a passport for AMH in April 1999, because the Hes had requested the Bakers to provide a photograph of AMH and the Hes told the Bakers that they were going to have a passport made for AMH.

98. In May 1999, the Bakers did not know that the Hes were illegal aliens.

99. On May 19, 1999, four (4) days before the end of the ninety-day foster care agreement, Ms. Chunn met with Mr. He to discuss future options for AMH's care. Mr. He indicated to Ms. Chunn that the Hes wanted to maintain parental rights, but allow the Bakers to keep and raise AMH. On May 20, 1999, Ms. Chunn called Mr. He and told him that the Bakers were unwilling to agree to temporary custody with the Hes retaining parental rights to AMH. On May 21, 1999, Mr. He called Ms. Chunn and told her that the Hes had decided to take AMH back into their care.

100. The Bakers did not suggest to the Hes that the Bakers had any interest in adopting AMH until shortly before the May 23, 1999, expiration of the ninety-day foster care period, when the Hes approached the Bakers with a request that the Bakers adopt AMH.

101. On or about May 23, 1999, the Hes met with the Bakers in the Bakers' home. Mr. He told the Bakers that the Hes had decided that the Bakers were the family that the Hes wanted to adopt AMH. However, Mr. He told the Bakers that Mrs. He wanted to retain parental rights so AMH would retain the He surname. Mr. He explained to the Bakers that Mrs. He wanted AMH to retain the He sumame because Mrs. He wanted to stay in the United States and she thought

that if AMH kept the He surname it would help the Hes remain in America. The Bakers told Mr. He that they were unwilling to keep AM H on that basis.

102. Mr. He then told the Bakers that the Hes would take AMH back from the Bakers because the Hes wanted to give AMH to an attorney, in exchange for the attorney helping the Hes with Mrs. He's civil lawsuit, involving the alleged personal injuries she received while pregnant with AMH. Mrs. Baker told Mr. He that he could go to jail for doing that. Mr. Baker then suggested the Hes go into another room and talk. The Hes went into another room I returned in a few moments, apologized to the Bakers, and told the Bakers that Mrs. He really wanted to win her lawsuit, but they did not have the money to hire an attorney. Mr. He then told the Bakers that both Mr. and Mrs. He wanted the Bakers to take and raise AMH. The Bakers then agreed to custody, rather than adoption with the Hes still retaining their parental rights, because the Bakers were afraid of what might happen to AMH if they did not agree to take custody of, and raise, AMH. The Bakers told the Hes that they would agree to custody only on the condition that it be sanctioned by a court order and the Hes agreed. The Hes and the Bakers then entered into an oral agreement that the Bakers would have custody of, and

would care for and raise AMH, until AMH's eighteenth birthday.

103. On May 24, 1999, Mr. He and Mrs. Baker called Ms. Chunn and told her that the Bakers and Hes had talked and the Bakers were now willing to accept temporary custody of AMH. Ms. Chunn got the impression from her conversation with Mr. He and Mrs. Baker that the Hes and the Bakers had agreed that the Bakers would raise AMH.

104. The Bakers and the Hes asked Ms. Chunn for advice as to whether and how a court order could be obtained to sanction their arrangement.

105. Ms. Chunn suggested that the Hes and the Bakers meet with an attorney to discuss the pros and cons of a custody agreement. Ms. Chunn gave no advice to either the Hes or the Bakers regarding whether the Hes or the Bakers should have separate attorneys to advise each of them concerning the legal implications of the Bakers' agreeing to assume the custody and care of AMH, without the Hes surrendering their parental rights.

106. After the May 24, 1999, conversation with Mrs. Baker and Mr. He, Ms. Chunn arranged a meeting with attorney Kevin Weaver on June 2, 1999, to explain the legal implications of transferring custody from the Hes to the Bakers. Mr. Weaver had previously advised Mid-South, as well as several other adoption agencies,

on various legal matters, from time to time. Mr. Weaver was not acting as the attorney for Mid-South at the June 2, 1999, meeting, but was conducting the meeting as a favor to Mid-South. Mr. Weaver was not acting as the attorney for either the Bakers or the Hes at this meeting. Mr. Weaver had not met either the Bakers or the Hes before the June 2, 1999, meeting, nor did he meet separately with either the Bakers or Mr. He prior to the June 2, 1999, meeting.

107. Both the Bakers and the Hes were scheduled to meet with Mr. Weaver on June 2, 1999. However, at the last minute, Mrs. He was unable to attend this meeting because of her work schedule. Mr. Weaver asked Mr. He if he wanted to postpone the meeting so Mrs. He could be present. Before the meeting began, Mr. He telephoned Mrs. He and explained to her that everyone was present and ready for the meeting and they were waiting on her to begin the meeting. Mrs. He told Mr. He that she was ready for the meeting to go forward and that they could proceed with the meeting without her. Mr. He told Mr. Weaver, Ms. Chunn, and the Bakers that he had spoken with Mrs. He and that she was ready to go forward, that they could proceed with the meeting without Mrs. He, and that Mr. He would explain everything to Mrs. He later.

108. Mr. Weaver then conducted the meeting and outlined to the Bakers and Mr. He what it meant to transfer custody and the risks and dynamics of temporary custody issues. Ms. Chunn was present throughout the meeting. Mr. Weaver explained that the Hes would be giving up certain parental rights, but not necessarily all parental rights. Mr. Weaver explained that the Bakers would be the ones with the ability to make the everyday decisions for AMH, i.e. school, healthcare, etc., but that the Hes would not be giving up their other parental rights.

109. Mr. Weaver told the Bakers and Mr. He that temporary custody meant someone taking care of and being responsible for someone else's child, and having all the legal responsibilities to provide for the child.

110. Mr. Weaver also explained to Mr. He the risk that if a temporary custody order was entered, a court would have to decide if there was a contest about the Hes regaining custody of AMH. Mr. Weaver explained that anyone who gives up even temporary custody takes the risk that they may not get custody back. Mr. Weaver also explained that a court would look at whether there was a change of circumstances, and what was in the child's best interest in deciding whether to allow a change in custody.

111. Mr. He asked questions during the meeting about whether the Hes could see AMH and how often they could see AMH. Mr. Weaver fully answered all of Mr. He's questions.

112. On June 3, 1999, Ms. Chunn and Mr. Kenny Yao, an experienced interpreter in English and Mandarin Chinese, met with Mrs. He, alone, in the Hes' apartment. Ms. Chunn wanted to make certain that Mrs. He understood what she would be doing if Mrs. He signed a consent custody order, and whether Mrs. He was one hundred percent willing for a transfer of custody of AMH from the Hes to the Bakers. Ms. Chunn explained to Mrs. He the things that Kevin Weaver had said to Ms. Chunn, the Bakers, and Mr. He, the day before in the meeting in Mr. Weaver's office. Mrs. He indicated that she understood everything that Ms. Chunn had told her through Mr. Yao. Mrs. He asked no questions of Ms. Chunn, through Mr. Yao.

113. On the evening of June 3, 1999, Mr. He called the Bakers and told them that Mr. and Mrs. He would agree to sign a consent order allowing the Bakers to have custody of AMH.

114. On June 4, 1999, the Hes, the Bakers, and Ms. Chunn met at Mid-South's office. The Hes rode with the Bakers and Ms. Chunn in the Bakers' van to the

Juvenile Court of Memphis and Shelby County, Tennessee.

115. Before the Hes signed the June 4, 1999 petition to change custody, Mid-South, through Ms. Chunn, signed the appropriate documents relinquishing all physical and legal custody of AMH that Mid-South had, by virtue of the ninety-day foster care agreement.

116. The Hes, the Bakers, and Ms. Chunn met with Ms. Sarah Cloud, a probation counselor and Foster Care Review Board coordinator for the Juvenile Court. Mr. Kenny Yao was also present for the meeting. Mr. Yao has been an official court translator for twenty-five years and is fluent in both Mandarin Chinese and English. Mrs. He speaks Mandarin Chinese and some English.

117. The Bakers and Ms. Chunn had requested an interpreter for Mrs. He to make certain that Mrs. He understood the proceedings and what she was agreeing to. The Bakers were concerned about Mrs. He changing her mind because she had changed her mind several times before. They were also concerned that Mrs. He might later claim that she did not understand what she was signing.

118. Ms. Cloud explained the Petition for Custody to the Hes. She explained the significance of the oath and the Hes' signature, under oath, on the Petition for Custody. The Hes signed the Petition for Custody,

which stated, "that the parents are unable to financially care and provide for said child at this time," in front of Ms. Cloud.

119. Before the Hes signed the Consent Order Awarding Custody, Ms. Cloud met privately in a conference room with Mrs. He, Ms. Chunn, and Mr. Yao, without Mr. He being present, to explain to Mrs. He the meaning of the Consent Order Awarding Custody. Ms. Cloud related everything necessary to the interpreter, Mr. Yao, to explain to Mrs. He the meaning of the Consent Order Awarding Custody. Mr. Yao explained the Consent Order in the way he thought best for Mrs. He to understand it. He did not read the document to her word for word. Mr. Yao felt that he sufficiently explained the meaning of the document to Mrs. He. Mrs. He said that she understood what Ms. Cloud had said during this meeting, and she made no statements to Ms. Cloud, Mr. Yao, or Ms. Chunn that she did not understand everything that Mr. Yao told her. Mrs. He did ask if this would be temporary custody, and she said the word "temporary" in English.

120. During the private conference with Ms. Cloud, Mr. Yao, and Ms. Chunn, Mrs. He was tearful, emotional, and frequently crying. Mrs. Chunn, who has many years of experience as a birth and adoption counselor, testified that it is not uncommon for birth mothers to

be upset and tearful when signing documents affecting the mother's custody or parental rights. Ms. Chunn further testified that being tearful, emotional, or upset is not an indication that the birth mother does not understand what she is doing.

121. After the private conference with Mrs. He, Ms. Cloud talked to both Mr. and Mrs. He and told the Hes that if the Bakers later refused to return custody of AMH to them, that the Hes would have to go to court and let a judge decide whether the Hes could have custody of AMH returned to them. Mrs. He emphasized that she did not intend to place AMH for adoption, but intended to place custody of AM H with the Bakers, reserving her right to return to Juvenile Court to petition the court for return of custody to the Hes, if she made such a choice in the future.

122. Ms. Cloud had a routine manner of handling petitions for custody, and she has handled hundreds of those cases. If anyone disagreed, or expressed any doubts about the understanding of, or willingness to sign, a consent order awarding custody, it was Ms. Cloud's practice to set petitions for custody for a hearing before the Juvenile Court Judge or a Referee. Ms. Cloud had no doubt that both Mr. and Mrs. He understood the Consent Order Awarding Custody, and signed it freely and voluntarily.

123. The Hes, the Bakers, Ms. Cloud, Mr. Yao, and Ms. Chunn were present in the conference room when Mr. and Mrs. He signed the June 4, 1999, Consent Order Awarding Custody. Neither the Hes nor the Bakers asked any questions when all of the parties signed the Consent Order Awarding Custody.

124. Ms. Cloud would not have allowed any of the parties to sign the consent order if either Mr. or Mrs. He, or Mr. and Mrs. Baker were not in agreement regarding custody of AMH. Ms. Cloud would not have allowed any of the parties to sign the consent order if she felt that anyone was being forced to sign the Order, or if she felt that anyone did not understand the Order.

125. Neither Mr. nor Mrs. He requested an interpreter for themselves or for each other. However, the Bakers requested an interpreter for Mrs. He to ensure her understanding of the document before she signed it. Neither the Hes nor the Bakers requested to have an attorney present in Juvenile Court on June 4, 1999, before the parties signed the Consent Order Awarding Custody of AMH to the Bakers.

126. The evidence establishes that both the Hes and the Bakers understood the June 4, 1999, Consent Order Awarding Custody before they signed it.

127. The evidence establishes that Mr. and Mrs. He understood that if the Bakers did not agree to relinquish custody of AMH, the only way for the Hes

to regain custody of AMH would be for the Hes to petition a court to regain custody, and the court would then determine whether the Hes would be allowed to regain custody of AMH based on a change in circumstances.

128. The evidence establishes that both Mr. and Mrs. He understood, before they signed the June 4, 1999, Consent Order Awarding Custody, that if they filed a subsequent petition to regain custody of AMH, there would be no guarantee or assurance that a court would allow the Hes to regain custody of AM H.

129. There is no credible evidence to support the Hes' contention that on June 4, 1999, the Hes understood that all the Hes had to do to regain custody of AMH in the future was to petition a court and custody of AMH would be returned automatically to the Hes.

130. The Hes and Ms. Chunn rode back to Mid-South's office in the Bakers' van. The Hes, the Bakers, and Ms. Chunn had normal, pleasant conversations on the ride back to Mid-South. Mrs. He was no longer crying or upset.

131. After the entry of the Consent Order Awarding Custody on June 4, 1999, the Hes wanted AMH to call Mr. and Mrs. Baker "mommy" and "daddy," and wanted AMH to call Mr. and Mrs. He "Jack" and "Casey." Sometimes Mr. He would refer to himself, when speaking to AMH, as "Uncle Jack." AMH has

always referred to the Hes as "Jack" and "Casey," since AMH was old enough to talk.

132. Mrs. Baker began keeping a journal of "Visits from Jack and Casey" on June 5, 1999. She kept this journal because Attorney Kevin Weaver had advised the Bakers and Mr. He, at the June 2, 1999, meeting, that the consent custody arrangement could go on for one (1) year or for eighteen (18) years. Because of the uncertainty of the length of time of the custody arrangement, and because of the Bakers' fear of what would happen to AMH if the Hes obtained custody of AMH, Mrs. Baker wanted to keep a record of the visits.

133. On July 25, 1999, Mr. He called Mrs. Baker and asked Mrs. Baker to go to a television station with AMH and the Hes to talk about the Hes' civil lawsuit for Mrs. He's personal injuries from the alleged assault. Mr. He wanted to try to establish that AMH received personal injuries, *in utero*, from the assault.

134. On November 14, 1999, Mr. He called Mrs. Baker and told her that the Hes were bringing a friend, Elizabeth Marshall, with them to visit AMH the next day. Mr. He asked the Bakers to pretend that they were foster parents of AMH, not custodial parents, during this visit. Ms. Marshall asked Mrs. Baker how long the Bakers had been foster parents and how she could give AMH up after fostering AMH for so long.

Mrs. Baker told Ms. Marshall that the Bakers had no intention of giving up AMH. During the visit, Ms. Marshall kept referring to AMH as II (AM H) Marshall." At a minimum, the implication is that there had been discussions between the Hes and Ms. Marshall about adopting AMH. After the visit, Mrs. Baker asked the Hes why they had brought Ms. Marshall to visit AMH. Mrs. He became agitated, said that Mrs. Baker was rude to Ms. Marshall, and Mrs. He refused to answer the question.

135. In August 1999, the Bakers told the Hes that Mrs. Baker was pregnant and she was due to deliver in February 2000. On the September 11, 1999, visit, the Hes expressed how excited they were that AMH would have a new sibling to grow up with. On the September 19, 1999, visit, Mrs. He commented that she was happy that AMH would have a sibling to go to school with. On October 15, 1999, the Hes asked the Bakers to promise that they would always send AMH to Christian schools. On October 31, 1999, the Bakers told the Hes that the Bakers would like to have photographs of the Hes while the Hes were young to be able to share with AMH when AMH grew up.

136. On December 22, 1999, the Hes brought gifts for the Bakers and all of their children, but did not bring a gift for AMH.

137. On February 28, 2000, after the birth of the Bakers' youngest child, Mrs. He told the Bakers that she was pleased that AMH had a new sibling, near AMH's age.

138. On May 3, 2000, the Hes talked to the Bakers about the kind of lessons the Hes wanted AMH to have, and the Hes inquired of the Bakers about the kind of college the Bakers planned to send AMH.

139. On May 3, 2000, the Hes signed a Petition to Modify the June 4, 1999, Juvenile Court Consent Order Awarding Custody. That petition was filed in the Juvenile Court on June 19, 2000. The Hes did not discuss with the Bakers the Hes' intention to pursue the petition to modify custody before the Hes went to Juvenile Court to begin the procedure.

140. Mr. He received a telephone call from the INS, regarding Mr. and Mrs. Hes' immigration status, around the same time the Hes signed the May 2000 Petition to Modify in Juvenile Court. Due to the close proximity of the call from the INS and the filing of the petition, the evidence shows that the Hes wanted to retain some parental rights only for the purpose of remaining in the United States.

141. On May 4, 2000, Ms. Chunn called Mrs. Baker to inform her that the Hes had signed a petition to modify custody in Juvenile Court. Mr. Baker called Mr. He to arrange a meeting between the two of them.

That same day, Mr. Baker met with Mr. He near the clubhouse at the Hes' apartment complex. Mr. Baker asked Mr. He why the Hes had signed the Petition to Modify in Juvenile Court. Mr. He told Mr. Baker that it was not Mr. He, but Mrs. He, who insisted on filing the Petition to Modify. Mr. Baker reminded Mr. He that the Hes had requested and agreed that the Bakers would raise AMH until age eighteen. Mr. He acknowledged that there was such an agreement, but that he and Mr. Baker needed to discuss making changes to that agreement. Mr. He told Mr. Baker that the Hes were going to ship AMH to China, but that he did not want to do that because the death rate for children of AMH's gender was fifty (50%) percent in the Peoples Republic of China. Mr. He stated that he did not want that to happen to AMH, but that he wanted AMH to stay with the Bakers. Mr. Baker got upset and started crying. Mr. Baker told Mr. He that Mr. Baker would do everything physically and financially he could do to prevent the Hes from sending AMH to the Peoples Republic of China. Mr. Baker then agreed to discuss making changes to their original agreement with Mr. He.

142. Mr. He discussed three possible changes to the original agreement with Mr. Baker. Mr. He wrote the first two options in his handwriting on a piece of paper, and he then dictated the third option, which Mr.

Baker wrote on the same piece of paper. The three options were:

> Option number one: The Bakers agree to give AMH back to the Hes without disputing custody in Court. The Hes agree that, in the event the Hes have to leave for China, they will let Bakers adopt AMH forever. The Bakers agree that they will not do anything to cause the Hes to leave the United States, by reporting the Hes to the United States government.
>
> Option number two: The Hes agree to stay in Memphis as long as they stay in the United States. The Hes will allow the Bakers to visit AMH in the Bakers' home no less than twice a week.
>
> Option number three: The Bakers and the Hes agree to keep their current agreement, with one supplement; the Hes may take AMH back to their home one day every other week. Such agreement will continue for 18 years. The Hes agree to leave care of AM H's passport to the Bakers.

143. On May 7, 2000, the Hes brought two people, Barney and Rosemary Binion, with them to the Bakers' home

to visit AM H. During the visit, the Hes wanted AMH to call the Binions "mawmaw and pawpaw," or something to that effect. Sometime during the visit, Mrs. Baker was in the kitchen when Mr. He came into the kitchen and told her that "everything is going to be alright." Later, Mr. He patted Mrs. Baker on the back and told her "don't worry, I will talk Casey into letting AMH stay."

144. On May 27, 2000, Mr. He kept making remarks about AMH and the Bakers' youngest daughter growing up together.

145. On June 28, 2000, a hearing was conducted on the Hes' first Petition to Modify custody in the Juvenile Court before Referee Claudia Haltom. Prior to the hearing, a Court Appointed Special Advocate ("CASA") conducted an investigation relative to the allegations contained in the May 3, 2000, petition, and provided a report of the investigation to Referee Haltom. The Bakers hired Kevin Weaver to represent them at this hearing. Mr. Weaver appeared with the Bakers to oppose the Petition to Modify custody.

146. Referee Haltom asked Mr. He how the Hes planned to take care of AMH if they regained custody. Mr. He responded that the Hes planned to send AMH to the Peoples Republic of China and the Hes would send $25.00 per month to China for AMH's support.

147. At the conclusion of the hearing, Referee Haltom entered an order in Juvenile Court on June 28, 2000, denying the Petition to Modify custody.

148. On September 11, 2000, Mr. He asked Mrs. Baker if she could show Mrs. He how to take care of the Hes' new baby, which was due in October 2000.

149. On December 23, 2000, the Hes visited AMH in the Bakers' home, but they brought no gift for AMH.

150. On January 28, 2001, AMH's second birthday, the Hes came to the Bakers' home to visit AMH and requested of the Bakers that the Hes be allowed to take AMH with them to have a family portrait made. The Bakers refused the Hes' request because AMH had been ill for several days prior to January 28, 2001. The Hes then became upset and angry, started raising their voices, and Mrs. He started screaming and crying. AMH then became upset and the Bakers asked the Hes to leave the Bakers' home. The Hes refused to leave. Mr. He became very pushy and told Mr. Baker to call the police. Mr. He told the Bakers, "I won't leave here." The Bakers then called the police to have the Hes removed from the Bakers' home.

151. Shelby County Sheriff's Deputies Astor, Mills, Blankenship, and Dugard came to the Bakers' home in response to the January 28, 2001, disturbance call. When the Deputies arrived at the Bakers' home, Mr. and Mrs. Baker were calm and Mr. and Mrs. He were

very irate and agitated. The Hes continued to be upset and agitated while the deputies conducted their investigation of the incident. During the investigation, the Hes were outside the Bakers' home yelling, screaming, and causing a disturbance.

152. Deputy John Astor could have arrested Mrs. He on January 28, 2001, because she was causing a disturbance outside the Bakers' home. Neither Mr. nor Mrs. Baker asked Deputy Astor to arrest Mr. or Mrs. He during the January 28, 2001, incident. After spending approximately forty-five minutes to one hour at the Bakers' home on January 28, 2001, Deputy Astor told the Hes to leave the Bakers' home and not to come back again that day. The reason Deputy Astor told the Hes not to come back to the Bakers' home that day was because he wanted to neutralize the situation and because he did not want Mrs. He to be arrested. Deputy Astor advised the Hes that their disagreement with the Bakers was a civil matter, and he advised the Hes to seek legal advice from an attorney about the matter.

153. Both Mr. and Mrs. He testified that they did not retum to the Bakers' home to visit AMH after the January 28, 2001, incident because they were afraid that they would be arrested by the police. However, the Court finds this testimony lacking in credibility, since there

have been numerous instances when the police were called due to Mrs. He's inappropriate behavior:

a. In November 1998, Mrs. He went to the office of Kathryn E. Story, Assistant Dean of Students for Social and Ethical Conduct at the University of Memphis. Mrs. He had previously met Ms. Story when Ms. Story went with the Hes to inspect the building where Mr. He said he had been with the Chinese student, who had made the sexual assault allegations against Mr. He. Mrs. He had returned to Ms. Story's office, apparently upset with Ms. Story. Mrs. He was very upset and called Ms. Story a racist devil. Ms. Story directed Mrs. He to go to a conference room to try to calm Mrs. He. While she was in the conference room, Mrs. He put her head back, held her breath, with mucous coming from her nose and spittle coming from her mouth. Ms. Story was very concerned about Mrs. He's condition. Ms. Story called a psychologist to come to try to calm Mrs. He down. Mrs. He continued to be very upset, holding her breath, gasping, and making a loud disturbance. The psychologist was unable to calm Mrs. He down. Ms. Story unsuccessfully tried to reach M r. He by telephone. Ms. Story then told her

secretary to call the University of Memphis campus police. The campus police arrived and got Mrs. He to leave the conference room and go into an adjoining room. Ms. Story then attempted to resume conducting business with students, however, she could not hear because Mrs. He was still causing a disturbance in the adjoining room. Ms. Story then told her secretary to call for an ambulance for Mrs. He. The ambulance arrived and took Mrs. He away.

b. On another occasion, August 1, 2000, while Mrs. He was visiting with AMH in the Bakers' home, when Mrs. Baker told Mrs. He that Mrs. Baker had to leave for an appointment, Mrs. He became very angry and started screaming at Mrs. Baker that Mrs. He would not leave. Mrs. He began screaming that the Bakers were "bad people, demons" and that Mrs. He was going to take AMH and leave. Mrs. He told Mrs. Baker to call 911 and the police, if Mrs. Baker wanted Mrs. He to leave. Mrs. He was holding AMH in her arms and AMH was upset and crying loudly. Mrs. Baker then telephoned Mr. Baker, who, in turn, telephoned Mr. He, who was working in Macon, Georgia at the time. Mr. Baker asked

Mr. He what the Bakers should do about Mrs. He. Mr. Baker asked Mr. He to call Mrs. He to try to calm her. After Mr. Baker arrived at the Bakers' home, Mr. Baker again called Mr. He to ask Mr. He if he had talked to Mrs. He. Mr. He responded that he had talked to Mrs. He, but she refused to leave, so the Bakers should call the police. Mrs. Baker then called the police, who came to the Bakers' home. The police advised Mrs. He to leave the Bakers' home and Mrs. He complied and left. The entire incident lasted approximately two hours. Mrs. He returned periodically to the Bakers' home after the August 1, 2000, disturbance, to exercise visitation with AMH, the same as she had done before the August 1, 2000, disturbance, until the January 28, 2001, disturbance.

c. On another occasion, sometime after the January 28, 2001, disturbance, Rebecca Smith, a neighbor of the Bakers, saw Mrs. He standing beside her car in front of the Bakers' home, holding a sign. Ms. Smith approached Mrs. He and asked Mrs. He to move her car because Ms. Smith was afraid for Mrs. He's safety. Mrs. He refused to move her car so Ms. Smith went inside her home and called the

police. Police officers arrived at the Bakers' home and spoke to Mrs. He, and, after that conversation, Mrs. He moved her car, but remained at the Bakers' home with her sign, and the police officers left.

154. Mr. He received a second telephone call from the INS regarding the Hes' current immigration status in the United States sometime in March, April, or May, 2001, around the same time that Mrs. He filed a second Petition to Modify custody in the Juvenile Court. Again, due to the close proximity of the call from the INS and the filing of the petition, the evidence shows that Mrs. He wanted to retain some parental rights for the sole purpose of avoiding deportation.

155. On April 9, 2001, Mrs. He signed the second Petition to Modify the Juvenile Court Consent Order Awarding Custody, which was filed in the Juvenile Court on May 29, 2001.

156. The Bakers filed the Petition For Adoption and Termination of Parental Rights on June 20, 2001, four (4) months and twenty (20) days after the incident in the Bakers' home on January 28, 2001.

B. Willful Failure to Support

157. The Hes had the ability to pay child support payments for AM H from January 28, 2001, to June 20, 2001.

158. The Hes swore, under oath, in the Petition to Modify custody that they signed on May 3, 2000, that "circumstances had changed" and that the Hes were "fully willing and able to properly care and provide for AMH," yet they willfully failed to provide support for AMH after May 3, 2000.

159. Mrs. He swore under oath on April 9, 2001, in the Petition to Modify custody, that the Hes were liable to provide care, support and proper supervision for AMH," yet, again, they willfully failed to provide support for AM H before and after April 9, 2001.

160. Even though there was no child support order in place, the Hes knew they had an obligation to provide child support for AMH from January 28, 2001, to June 20, 2001, as evidenced by statements made to Referee Haltom at Juvenile Court and the fact that they provided support for their son, Andy.

161. The Hes paid no support for AMH from January 28, 2001, to June 20, 2001.

162. During the June 28, 2000, hearing before Referee Haltom at the Juvenile Court, Mr. He told Referee Haltom that the Hes would send $25.00 per month to

China for AMH's support, if the Hes regained custody of AMH.

163. The Hes paid someone to take their younger son, Andy, to the Peoples Republic of China during the month of May 2001. The Hes began sending $1,000.00 per month to China to support their son, Andy, sometime during May 2001.

164. Sometime after sending her son, Andy, to China, Mrs. He purchased a new computer.

165. The Hes took vacation trips to New Orleans, Atlanta, Arizona, Ohio, and California, between June 4, 1999 and June 20, 2001. The Hes also took trips for other purposes to Atlanta and Washington, D.C., during the same time period.

166. The Hes lived in an apartment and paid monthly rental payments of $625.00 during the period from January 28, 2001, to June 20, 2001.

167. The Hes used their economic resources to accumulate and purchase non-necessary possessions and to take multiple vacations for pleasure and several trips for other purposes, all consistent with the Hes' agreement with the Bakers that the Bakers would raise AMH until age eighteen, and evincing the Hes' intention to forego all parental obligations and responsibilities for AMH.

C. Hes' Child Support

168. During the foster care period, February 24, 1999. to May 23, 1999, the Hes put a sum of money, approximately $300.00, on the Bakers' couch during a visit. Mrs. He told the Bakers that the Hes would give the Bakers more money for AMH's support as soon as they were financially able. Mrs. Baker told the Hes that the Bakers could not take the money. The Bakers were not allowed to accept money for foster children in their care, except for the $6.00 per day that Mid-South paid the Bakers under the foster care agreement with Mid-South.

169. On June 4, 1999, when the Hes signed the Juvenile Court Consent Order Awarding Custody, there was no mention of child support.

170. Because of the agreement with the Hes that the Bakers were to rear AMH to age eighteen, the Bakers did not expect the Hes to make payments to support AMH, and the Bakers never asked the Hes to pay child support for AMH, after the June 4, 1999, Consent Order Awarding Custody was entered.

171. By signing the June 4, 1999, Consent Order Awarding Custody, the Hes intended to absolve themselves of all parental obligations to provide support, or any other care for needs of AMH during the AMH's minority.

172. During the Hes' approximate eighty (80) visits with AMH, between June 4, 1999, to January 28, 2001, they occasionally brought items for AMH. The items the Hes brought to AMH were children's books, food items (pears, apricots, watermelon seeds, Jello, baby food, porridge, and a whole, bone-in fish), articles of used clothing, a stuffed animal, a box of diapers, an inexpensive necklace, and a small Sesame Street suitcase. All of these items were of insubstantial economic value and amounted to token support.

173. The Hes provision of only token support for AMH from June 4, 1999 to January 28, 2001, was consistent with the Hes' intent to absolve themselves of all parental responsibilities to AMH.

D. Willful Failure to Visit

174. The Hes did not attempt to otherwise call, write, or make any other attempt to contact the Bakers about visiting AMH, or to inquire about AMH's well-being from January 29, 2001, to June 20, 2001.

175. The Hes willfully failed to visit AMH from January 29, 2001, to June 20, 2001.

176. The Hes testified that they did not visit AMH after January 28, 2001, because they feared for their personal safety if they returned to the Bakers home for

a visit. The Court finds the Hes testimony to be lacking in credibility.

177. After January 28, 2001, the Hes willfully made the decision not to visit AMH.

178. Between January 28, 2001, and June 20, 2001, the Hes never visited AMH and never made a request to the Bakers to visit AMH.

179. The Hes right to visit AMH was never restricted by any court until February 8, 2002, when this Court entered an order prohibiting the Hes from attempting "to have any contact, direct or indirect, in person, or otherwise, with AMH," until further order of the Court. The Court entered the February 8, 2002, "no-contact" order because, on February 7, 2002, the Court had ordered the Hes to deliver AMH's passport to the Clerk & Master by 4:00 P.M. that day. At 4:00 P.M. on February 7, 2002, the Hes' counsel telephoned the Court and advised the Court that the Hes had no intention of complying with the Court's order, and the Court then entered the "no-contact" order the next day.

180. The Bakers were willing to allow the Hes to have visits with AMH after the January 28, 2001, disturbance in the Bakers' home, but the Hes never contacted the Bakers and requested any visitation with AMH.

181. Immediately after the January 28, 2001, disturbance, the Bakers decided that all future visits by the Hes would have to be arranged at a location other than the Bakers' home because of the August 1, 2000, and January 28, 2001, disturbances.

182. Immediately after January 28, 2001, in furtherance of the necessity to arrange future visitations at a site other than the Bakers' home, Mrs. Baker telephoned the Exchange Club Family Center to inquire about its ability to provide visitation services and facilities for any future visits with AMH by the Hes.

183. The Bakers were willing to allow the Hes to have visits with AMH, through the facilities of the Exchange Club Family Center, even after Mrs. He signed her second Petition to Modify custody.

184. The only contact the Hes made with the Bakers after January 28, 2001, occurred on April 2, 2001. On that date, Mrs. He called the Bakers' home and left the following message on the Bakers' telephone answering machine: "Come to my home and get your baby bed, we are moving, thank you, bye bye."

185. The Bakers did not respond to Mrs. He's April 2, 2001, telephone call because Mrs. He did not say anything about AMH or about wanting to visit AMH. The Bakers did not go to the Hes apartment after Mrs. He's April 2, 2001, telephone call.

186. The INS contacted Mr. He about the Hes' immigration status in March, April, or May, 2001.

187. Mrs. He signed a second Petition to Modify the Consent Order Awarding Custody on April 9, 2001, that was subsequently filed in Juvenile Court on May 29, 2001. The Court notes that Mrs. He did not request visitation with AMH when she filed the petition to modify custody. It is well-settled that a parent may always petition to have visitation reinstated upon a showing of changed circumstances.[4] Mrs. Hes' willful failure to seek reinstatement of visitation with AMH demonstrates that her goal in filing the Petition to Modify to regain custody was for the sole purpose of remaining in the United States and avoiding deportation. Mrs. Hes' failure to ask the Court to reinstate visitation with AMH, when she could have easily done so, evinces Mrs. Hes' willful abandonment of AMH.[5]

188. The Bakers filed the Petition For Adoption and to Terminate Parental Rights in this Court on June 20,

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[4]*White v. White*, 2000 Tenn. App. LEXIS 259 (April 26, 2000).

[5]Dawn Coppock, *Coppock on Tennessee Adoption Law*, (Matthew Bender, 2003), at 35.

2001, and on June 22, 2001, the Juvenile Court for Mem phis and Shelby County, Tennessee deferred to this Courfs jurisdiction pursuant to Tennessee Code Annotated § 36-1-116(f)(2), and Mrs. He's May 29, 2001, Petition to Modify was transferred to, and assumed by, this Court.

E. Hes' Visitation from June 4, 1999 to January 28, 2001

189. Thc Hes visitation and contact with AMH has been subject to the Bakers' discretion since the June 4, 1999, Consent Order Awarding Custody of AMH to the Bakers.

190. The Bakers did not obstruct, inhibit, discourage, or otherwise interfere with any reasonable desire on the part of either Mr. or Mrs. He to visit AMH.

191. Between June 4, 1999, and January 28, 2001, either Mr. or Mrs. He, or both, visited AMH in the Bakers' home, approximately eighty (80) times. The Hes visited AMH, on average, approximately once per week. There were some occasions when the Hes would go two weeks or longer between visits with AMH. The average time of each visit was approximately one (1) hour, with the shortest visit lasting approximately thirty (30) minutes and the longest visit lasting approximately two (2) hours. The

approximately eighty (80) hours of time that the Hes have visited with AMH. from June 5, 1999, to January 28, 2001, amount to a total of less than four (4) days of AMH's life.

192. The visitation by either Mr. He or Mrs. He, or both, from June 4, 1999. to January 28, 2001, was insignificant, token visitation.

193. Mr. or Mrs. He, or both, missed several scheduled visits with AMH and sometimes did not call the Bakers to notify them that they would be unable to appear for the visits.

194. Mr. or Mrs. He, or both. were sometimes late for scheduled visits with AMH, without notifying the Bakers that the Hes would be late.

195. The Bakers allowed the Hes to make up missed visits with AMH, even when the Hes had failed to call the Bakers to advise them that the Hes would not appear for a scheduled visit.

196. The Bakers would sometimes schedule visits with AMH for the Hes at times that were not convenient for the Bakers' schedule.

197. Mr. He interacted very little with AM H during the visits. In fact, he spent most of his time during the visits talking to Mr. Baker.

198. Although Mr. Weaver explained to the Bakers their right to file a petition to adopt and to terminate parental rights in May 2000, the Bakers decided

against filing such a petition. The Bakers did not discontinue, or attempt to discontinue, the Hes' visitation while the Hes' Petition to Modify custody, signed on May 3. 2000. and filed in Juvenile Court on June 19, 2000, was pending. The Hes visits with AMH in the Bakers' home also continued uninterrupted, even after the Hes' Petition to Modify custody was dismissed by the Juvenile Court on June 28, 2000.

199. During the months of July and August 2000, Mr. He visited AMH in the Bakers' home only two (2) times because he was temporarily working in the Atlanta, Georgia, area. The Bakers offered Mr. He the opportunity to visit AMH during this period of time, when he would periodically return to Memphis, but Mr. He told the Bakers that he was too busy to schedule a visit with AMH.

200. The Bakers put reasonable restrictions on the Hes' visits after the August 1, 2000, disturbance, when Mrs. He refused to leave the Bakers' home until the police came and ordered Mrs. He to leave.

F. Child Support Payments and Attempted Visitation After June 20, 2001

201. The Hes started sending the Bakers checks for AMH's support in August or September 2003. The Bakers have not cashed any of those checks.

202. The Hes first attem pted to visit AMH after the June 20, 2001, Petition for Adoption and to Terminate Parental Rights, by filing a Motion for Immediate Visitation with this Court on February 20, 2002.

203. The Hes' attempts to pay support and to visit after June 20, 2001, were attempts to repent from, or rectify the Hes' willful failure to support or to visit AMH for four (4) consecutive months before the filing of the Petition to Terminate Parental Rights.

VI. SETTLED PURPOSE TO FOREGO ALL PARENTAL RIGHTS

204. Although the "settled purpose doctrine" was repealed legislatively in 1996 and no longer has any force or effect as law in Tennessee, a review of the evidence in this cause establishes that the actions of the Hes evince a settled purpose to forego all parental rights and responsibilities.

205. From June 4, 1999, through June 20, 2001, the Hes' visits with AMH were so sporadic, and of such short

duration, that it evinced a desire to forego their parental responsibilities to AMH, and it was in conformity with the Hes' agreement that the Bakers would raise AMH until age eighteen.

206. From June 4, 1999, through June 20, 2001, the frequency and duration of the Hes visits with AMH evinced their intention to have only enough contact with AM H to serve the Hes' stated objective to avoid deportation.

207. On or about the times that the Hes filed a petition to modify custody, Mr. He had been contacted by the INS regarding the Hes' illegal alien status.

208. The United States Immigration officials have suspended the Hes' deportation proceedings until this cause is concluded.

209. The Hes failure to provide more than token support for AMH from June 4, 1999 through January 28, 2001, evinced the Hes' intent to relegate all responsibility for AMH's care and support to the Bakers, consistent with the Hes' agreement that the Bakers would raise AMH to age eighteen (18).

VII. BEST INTEREST FACTORS

210. Dr. David Goldstein performed a psychological evaluation of AMH over a period of seven months, from January 21, 2002, to July 2, 2002. After

reviewing Dr. Goldstein's report, his trial testimony, and the entire record in this cause, the Court finds, due to AMH's highly organized manner, AMH is not good at adaptability and is easily upset by changes. Permanently removing AMH from AMH's present environment may cause lasting harm from the loss of AMH's psychological parents, the Bakers. AMH has a powerful parent-child bond with the Bakers, which was developed during the first three (3) years of AMH's life, which is considered a critical period for the building of such attachments. Because of this strong bond, if AMH is separated from the Bakers, AMH may experience intense separation anxiety or a grief reaction akin to depression. This reaction may disrupt AMH's emotional, educational, and social development. The long.term risks of removing AMH from the Bakers' home include increased vulnerabilities to anxiety, mood disorders in adolescence and adulthood, reduced stress tolerances, and disturbances in future intimate relationships. These risks would not dissipate even if the Hes were able to provide a stable home for AMH after AMH's removal from the Bakers' home.

211. AMH's transcultural placement with the Bakers also has risks, including AMH's possible questioning of AMHs' identity, origins, and the motives of AMH's biological parents. Another risk that is inherent in any

adoption is the risk that the adopted child will develop feelings of abandonment as the child grows older, if the parental rights of the biological parents are terminated. Such risks can be mitigated so long as the Bakers are sensitive and responsive to issues surrounding racial, cultural, and biological identity, and to issues related to any feelings of abandonment AMH may at some point develop. The Bakers have demonstrated a sensitivity and responsiveness to such issues.

212. Dr. John Hutson testified that the Bakers are the psychological parents of AMH, and that removal of AMH from the Bakers would terminate AMH's relationship with AMH's psychological parents, which would be traumatic for AMH. Dr. Hutson testified that the Hes are not AMH's psychological parents. Dr. Hutson testified that there would be a breaking off of a parental relationship if the Hes told AMH to call the Bakers "mommy" and "daddy", and the Hes "Jack" and "Casey."

213. Separating AMH from the Bakers would cause serious and enduring emotional and/or psychological harm to AMH.

214. AMH has been continuously nurtured, loved, cared for, provided for, educated and reared by the Bakers, since AMH was twenty-seven (27) days old, with

every need being met to ensure AMH's proper upbringing.

215. AMH has been in good health and has thrived while in the Bakers' care.

216. Since February 23, 1999, AMH has been lovingly accepted by Mr. and Mrs. Baker, the four natural born children of the Bakers, the maternal and paternal grandparents, aunts, uncles, and cousins of the Bakers' natural born children, without distinction, the same as if AMH had been a natural born child of the Bakers.

217. AMH is in a strongly bonded, deep-seated, healthy relationship with the Baker family and extended family.

218. AMH does not have a strongly bonded relationship with Mr. and Mrs. He. The Hes had physical custody of AMH from February 8, 1999, to February 24, 1999, when the Hes gave custody to Mid-South, a total of sixteen (16) days out of AMH's five years. Beginning with the ninety-day foster care period, Mrs. He relinquished her parental responsibility of caring for and nurturing AMH to Mrs. Baker. Mrs. He also relinquished her parental responsibility of providing for, educating, and rearing AMH to the Bakers. During AMH's first few months of life, when Mrs. He would visit with AMH and hold AMH in her arms, Mrs. He would give AMH back to Mrs. Baker each

time AMH started to cry. During the first few years of AMH's life, Mr. He had very little contact at all with AMH. Mr. He would spend most of his time during the Hes' visits with AMH talking to Mr. Baker about other things. Mr. He relinquished his parental responsibility of caring for and nurturing AMH to the Bakers.

219. As AMH grew older, the Hes would use food to entice AMH to come to the Hes during their visits in the Bakers home.

220. A videotape of the September 23, 2003, session in Dr. Goldstein's office shows that AMH would continuously cling to Mrs. Baker when the Hes would attempt to get AMH to come to the Hes. The Bakers tried to encourage AMH to have interaction with the Hes, but AMH was very reluctant to approach the Hes. The Hes then used food to entice AMH to come to the Hes, but AMH would immediately return and cling to Mrs. Baker after AMH took the food from the Hes. After the Bakers left the room, AMH sat between the Hes on a sofa for a few moments before the session concluded. On the ride home from this session, Mrs. Baker reported that AMH did not want to return to Dr. Goldstein's office again, even though AMH had not voiced any reluctance to go to Dr. Goldstein's office before September 23, 2003.

221. AMH has a disproportionately stronger attachment to the Bakers than to the Hes because of prolonged inattention by the Hes to AMH.

222. The Bakers have performed all parental duties and responsibilities in relation to, and for, AMH, to AMH's benefit, faithfully and without exception, since February 23, 1999.

223. Since February 23, 1999, AMH has been in a well-integrated, safe, stable home provided by the Bakers.

224. In contrast, the Hes have not exhibited that they would be able to provide the same safe and stable home, as evidenced by, among other things, the lack of cleanliness of the Hes' apartment. For example, the Bakers gave the Hes a desk and a microwave cart. When Mr. Baker took these items to the Hes' apartment, he saw beer cans everywhere, a filthy kitchen, bones everywhere from food, and there was a foul smell in the apartment.

225. The Bakers are insuring that AMH is being properly educated and introduced to peers outside the Bakers' home under circumstances that are healthy and that contribute to AM H'S well-adjusted development.

226. The Bakers have not taught AMH anything negative about the Hes, but have nurtured a positive attitude in AMH toward the Hes and, to the extent consistent

with AMH's wellbeing, have permitted contact with AMH by the Hes.

227. The Bakers have demonstrated the ability to properly rear children through their care of AMH and their other natural born children.

228. AMH has flourished while in the Bakers' care. AMH's gross and fine motor skills are advanced relative to children her age. AMH is a curious, particular, and careful child, who has a fastidious manner. AMH thrives on organization and routine. AMH likes people and enjoys playing with friends, including AMH's Sunday School class and an organized group of Chinese friends.

229. The Bakers have acknowledged AMH's needs to be aware of AMH's Chinese heritage, and they have striven to educate AMH about that heritage. AMH is aware that AMH is Chinese, however, AMH identifies AMH as a member of the Baker family.

230. AMH shares a room in the Bakers' home with the Bakers' four-year-old biological child, and the two have a very close, almost inseparable, sibling relationship. AMH also has a close relationship with the other three Baker children.

231. The effect of a change of AMH's caretakers from the Bakers to the Hes is likely to have a harmful impact on AMH's emotional and psychological condition.

232. During the first five (5) years of AMH's life, AMH has developed a strong psychological and emotional attachment to the Bakers. Any harm to AMH from a transcultural placement or from terminating any further contact with the Hes, is substantially outweighed by the likely harm to AMH due to removal from caretakers with whom AMH has such a strong psychological and emotional attachment.

233. In contrast to the Bakers, the Hes have continually placed their needs and desires above those of AMH. Although the Hes have had financial means they have, at best, paid only token support. They have utilized their resources on themselves and allowed for the Bakers to provide for the care of their biological child. They have made both value and lifestyle choices that are inconsistent with caring, concerned, loving parents. It is obvious to the Court that the Hes want AM H when it is both beneficial and convenient for them, but not when it imposes any degree of hardship or inconvenience to them.

234. There is no credible proof in the record to determine the employment prospects or the living conditions that the Hes would have in the Peoples Republic of China.

235. There is a "one-child-per-family" policy in the Peoples Republic of China. Families with more than one child are subject to financial penalties and/or the

loss of government services and benefits, including medical care and educational benefits.

236. If the Hes return to the Peoples Republic of China to live, they will be outside the jurisdiction of this Court.

237. Mr. He fears returning AMH to the Peoples Republic of China because the death rate for children of AMH's gender is fifty (50%) percent in that country.

238. The evidence shows Mr. He to be a person of questionable character. By his own admission, he is dishonest. The evidence shows that he has acted in a manipulative manner, and that he has little hesitation to violate societal rules, regulations, laws, or court orders if he disagrees with them. Mr. He has demonstrated a pattern of conducting his affairs and his life by an end-justifies-the-means philosophy, and that Mr. He, alone, decides what ends justify what means. The evidence further shows that Mr. He has acted in an unstable manner in the past, and as a person whose future conduct, in relation to AMH, cannot be predicted.

239. The evidence shows Mrs. He to be a person of questionable character and unstable. The evidence shows that she is dishonest and manipulative, and that she has little hesitation to violate societal rules, regulations, laws, or court orders if she disagrees with them. Mrs. He has a history of acting in an unstable manner, as a person whose future conduct in relation

to AMH is unpredictable, and that she has acted in a manner that facilitates and cooperates with Mr. He in his erratic, manipulative, and dishonest behavior.

240. Mrs. He has demonstrated a pattern of engaging in irrational and bizarre behaviors. Either she is unable to control her irrational and erratic behavior, or she is able to control her behavior and she deliberately chooses to engage in such behavior for the purpose of manipulating others and getting her own way.

241. During the August 1, 2000, disturbance, Mrs. He was on the telephone with Mr. He, screaming at Mr. He that the Bakers were "bad people, demons." Mrs. Baker called Mr. He later that evening to ask how Mrs. He was doing. Mr. He told Mrs. Baker that Mrs. He was fine, but that she had been very depressed, and that he felt Mrs. He might try to commit suicide.

242. On December 10, 2001, Mrs. He threatened the alleged victim of Mr. He's assault in Criminal Court, and Judge Blackett admonished Mrs. He for her conduct.

243. In a hearing before the Court in February 2002, after the Court ordered Mrs. He to deliver AMH's passport to the Court, Mrs. He refused the order, held her hands over her head, and said, "take me to jail, take me to jail."

244. On or about December 1, 2003, Mr. and Mrs. He approached AMH at a Wal-Mart store, in direct

violation of the Court's order prohibiting contact between the Hes and AMH. Mrs. He assaulted the Bakers' teenage daughter, Hope, in an attempt to forcibly take AMH from the care and custody of the Bakers' teenage daughter and leave the Wal-Mart premises.

245. While Mrs. He was attempting forcibly to take AMH from the Bakers' daughter, Mr. He falsely represented to a Wal-Mart supervisor that the Bakers' daughter had forcibly taken AM H from the Hes, and that Mrs. He was merely attempting to regain custody of AMH from the Bakers' daughter.

246. The Hes have demonstrated a pattern of falsely accusing persons who fail to act according to the Hes' requests, demands, or desires. The Hes have shown a propensity to falsely accuse others of bias, prejudice, unethical conduct, or intentionally lying when others do not do what the Hes want them to do, say what the Hes want them to say, or when others say or do things that the Hes disagree with. The Hes also have shown a propensity to falsely accuse persons who oppose the Hes, or disagree with them in any way, of being part of a conspiracy to harm the Hes.

247. The Hes have falsely accused Ms. Mullins, Dr. Goldstein, Ms. Cloud, Ms. Chunn, Mid-South Christian Services, Kathryn Story, the Bakers, and counsel for the Bakers of having been involved in a

conspiracy against the Has to deprive them of regaining custody of AMH.

248. The questionable character and personality of both Mr. and Mrs. He poses a threat to AMH 's well-being if AMH 's custody is returned to the Hes.

249. When asked by Jeni DiPrizio, a television reporter, on February 7, 2002, whether Mr. and Mrs. He intended to deliver AMH's passport to the Clerk and Master, as ordered by the Court, Mr. He asked Ms. DiPrizio whether turning the passport in, or not, would make the best news story. This statement by Mr. He is one example of Mr. He's willingness to use any means, including manipulative publicity, to accomplish his goals, even when ordered by a court to refrain from doing so, rather than to act in AMH's best interests, by obeying court orders and pursuing his claims through the legal system.

VIII. CONCLUSIONS OF LAW

Although the Fourteenth Amendment of the United States Constitution, and Article One, Section Eight of the Tennessee Constitution grant biological parents constitutional rights which must be guarded and protected, the same constitutional provisions grant minor children constitutional rights which must be guarded and protected. Tennessee Code

Annotated § 36-1-101 (d) also recognizes the rights of minor children:

> In all cases, when the best interests of the child and those of the adults are in conflict, such conflict shall always be resolved to favor the rights and the best interests of the child, which interests are hereby recognized as constitutionally protected and, to that end, this part shall be liberally construed.

A minor child has the right to be reared by parents who are not unfit, that is, parents who do not abandon the child by willfully failing to support or visit the child. A minor child of tender years has the right not to be removed from guardians with whom the minor child has developed a strong psychological and emotional attachment, when removal would cause substantial harm to the child. A minor child also has the right not to be removed from guardians who have provided a safe, stable, healthy, loving environment for the child for such a length of time that removal would cause substantial harm to the child. The Court must attempt to balance the constitutional rights of both the parents and the child when these rights are in conflict with each other.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State shall "deprive any person of life, liberty, or property without due process of law." More than 75 years ago the U.S.

Supreme Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home, bring up children, and to control the education of their own."[6] "The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children."[7]

While this Court recognizes this significant parental liberty interest, this interest is not without limit. Parents' rights with respect to their children have never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.[8] These limitations have arisen, not simply out of the definition of parenthood itself, but because of, among other reasons, the child's own interest in preserving relationships that serve the child's welfare and protection.[9] Minor children, as well as

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[6]*Meyer, supra*, at 399, 401.

[7]*Troxel v. Granville*, 530 U.S. 57, 66 (2000).

[8]*Troxel, supra*, at 88.

[9]*Id .o citing Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

adults, are protected by the U.S. Constitution and possess constitutional rights.[10]

The United States Supreme Court, on numerous occasions, has acknowledged that children have constitutionally protected rights and liberties in many circumstances.[11] To suggest otherwise would be to suggest that, when it comes to parental rights, children are "so much chattel".[12] "The constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the States from protecting children against the

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[10] *Id., at 88-89, citing Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

[11] *Id., see Parham v. JR.*, 442 U.S. 584, 600 (1979) (liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority"); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506-507 (1969) (First Amendment right to political speech); and *In Re Gault*, 387 U.S. 1, 13 (1967) (due process rights in criminal proceedings).

[12] *Id.*, at 89.

arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child."[13]

This is not to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. Substantive due process case law requires the Court to acknowledge the strong legal presumption that parents will act in their child's best interest.[14] Absent a finding that the parents are unfit, such as when the parents willfully abandon the child, the law presumes that parental rights should not be terminated.[15] Notwithstanding this strong legal presumption, it is the opinion of this Court that there may be circumstances in which a child has a stronger interest at stake than merely the protection from harm caused by the termination of parental rights. This Court must consider the impact on AMH of arbitrary parental decisions that neither serve nor are motivated by AMH's best interest.

A. General Conclusions of Law

250. The Court concludes that it has subject matter and personal jurisdiction to adjudicate the issue of

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[13] *Id.*

[14] *Id.*, at 89-90.

[15] See Tenn. Code Ann. § 36-1-113

whether Mr. and Mrs. Hes' parental rights should be terminated.

251. The Court concludes that it has subject matter and personal jurisdiction to adjudicate the issue of whether the June 4, 1999, Juvenile Court Consent Order Awarding Custody of AMH should be modified.

252. The Court concludes, by clear and convincing evidence, that the June 4, 1999, Consent Order Awarding Custody, entered by the Juvenile Court of Memphis and Shelby County, Tennessee. is a valid order of a court of competent jurisdiction and has the force and effect of appointing the Bakers as legal custodians and guardians of AMH.

253. The Court concludes, by clear and convincing evidence, that the June 4, 1999, Consent Order Awarding Custody, entered by the Juvenile Court of Memphis and Shelby County, Tennessee, is not facially invalid or defective.

254. The Court concludes that the Hes and the Bakers knowingly and voluntarily signed the June 4, 1999, Consent Order Awarding Custody in the Juvenile Court of Memphis and Shelby, County, Tennessee.

255. The Court concludes, by clear and convincing evidence, that by virtue of the June 4, 1999, Consent Order Awarding Custody, the Bakers were appointed,

and have remained, the legal custodians and guardians of AMH.

256. The Court concludes, by clear and convincing evidence, that Mr. and Mrs. He waived any right to modify, amend, set aside, or dismiss the June 4, 1999, Consent Order Awarding Custody and making the Bakers AMH's guardians by:

(1) by failing to timely file an appeal of said order;

(2) by filing the May 3, 2000, Petition to Modify custody in the Juvenile Court. without challenging the validity of the Consent Order Awarding Custody;

(3) by failing to timely file an appeal of the denial of the May 3, 2000, Petition to Modify custody; and

(4) by filing the May 29, 2001, Petition to Modify custody without challenging the validity of the Consent Order Awarding Custody.

257. The Court concludes that Mr. Weaver explained to the Bakers and Mr. He that custody means the actual physical care of the child and includes the right and responsibility to provide for the physical, moral and emotional well-being of the child. The Court concludes that Mr. Weaver explained the legal

ramifications involved with modifying a temporary custody order, and that there existed a possibility that custody of AMH might not be returned to the Hes. The Court concludes that Mr. He was made fully aware of the legal consequences of agreeing to give the Bakers temporary custody of AMH and the legal requirements of regaining custody later.

258. The Court concludes that Mrs. He waived any right she may have had to be advised by an attorney before she filed the Petition for Custody and signed the Consent Order Awarding Custody in the Juvenile Court for Memphis and Shelby County, Tennessee, by relying on Mr. He to explain the things that attorney Kevin Weaver had told Mr. He at the June 2, 1999, meeting.

259. The Court concludes that neither Mr. or Mrs. He were deprived of their constitutional right of due process.

260. Ordinarily court orders involving the custody of minor children are subject to modification, at any time, based upon a material change in circumstances. However, in this cause, the Hes filed a Motion Pursuant to T.R.C.P. Rule 60.02 to Set Aside Consent Order Awarding Custody Entered June 4, 1999. In that motion the Hes requested this Court to set aside or dismiss the June 4, 1999, Consent Order Awarding Custody on the ground that the Consent Order is void. The Hes claim that the Consent Order is void because

Mrs. He was not fully advised of her legal rights before she signed the Consent Order. The Court concludes that the Hes are barred by the doctrines of *res judicata*, collateral estoppel, and laches from seeking to set aside or dismiss the June 4, 1999, Consent Order Awarding Custody and making the Bakers' AMH's guardians. *Res judicata* is the rule that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.[16] Collateral estoppel is the rule that when an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation.[17] The doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. Laches is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.[18]

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[16] Black's Law Dictionary (West, 1983), at 678.

[17] *Id.*, at 136.

[18] *Id.*, at 453.

261. The Court concludes that there is no legal distinction between legal custody and guardianship for the purposes of deciding the issues in this cause. The Consent Order Awarding Custody entered by the Juvenile Court on June 4, 1999, awarded the custody and "guardianship of the person" of AM H to the Bakers. *Tennessee Code Annotated* § 37· 1-102 defines custody as, "the control of actual physical care of the child and includes the right and responsibility to provide for the physical, mental, moral and emotional well-being of the child." This statute also provides that "custody" relates to those rights and responsibilities that are exercised by the parents.

262. Regarding the definition of "guardian," *Tennessee Code Annotated* § 37-1-102 provides that, "'Guardian' means, for purposes of adoptions and terminations of parental rights, the meaning set forth in (*Tennessee Code Annotated*) § 36-1-102, and for all other purposes (emphasis added), the meaning set forth in (*Tennessee Code Annotated*) § 34-1·101." *Tennessee Code Annotated* § 34-1-101 defines guardian as, "a person or persons appointed by the court to provide partial or full supervision, protection and assistance or the person or property or both of a minor." While this matter is now before the Court on a Petition For Adoption and to Terminate Parental Rights, at the time of entry of the Consent Order

Awarding Custody in Juvenile Court, it only involved custody, and not adoption or termination of parental rights.

263. The Court concludes that all proceedings concerning AMH's custody, pending in Juvenile Court on June 20, 2001, were transferred to this Court to be adjudicated pursuant to *Tennessee Code Annotated* § 36-1-116(D(1).

264. The Court concludes that in order to terminate the parental rights of either Mr. or Mrs. He, the ground for termination must be a ground set forth in *Tennessee Code Annotated* § 361-113 and must be established by clear and convincing evidence as to each such ground.

265. The Court concludes that the Court must also determine by clear and convincing evidence whether termination of the Hes' parental rights is in AM H's best interest.

266. The Court concludes that Tennessee law does not permit parents to repent from, or rectify, an act or omission that, before the date the petition to terminate parental rights was filed, constituted a ground for termination.[19]

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[19] *Tenn. Code Ann. § 36-1-102(1)(F) In Re D.L.B.*, 2002 Tenn. App. LEXIS 575 (August 6, 2002).

267. The Court concludes that the parents of a minor child cannot be excused from willfully failing to make child support payments by entering into a private agreement with other persons who agree to, and who in fact, financially support the said minor child.

268. The Court concludes that Mr. and Mrs. He had a duty to support AMH pursuant to *Tennessee Code Annotated* § 34-1-102.

B. Conclusions of Law on Parental Termination Grounds

269. *Tennessee Code Annotated* § 36-1-113(g)(1): The Court concludes, by clear and convincing evidence, that Mr. He knowingly and willfully abandoned AMH, by knowingly and willfully failing to provide any child support for AMH and by knowingly and willfully failing to visit AMH for four (4) consecutive months immediately preceding the filing of the June 20, 2001, Petition to Adopt and to Terminate Parental Rights.

270. *Tennessee Code Annotated* § 36-1-113(g)(1): The Court concludes, by clear and convincing evidence, that Mrs. He knowingly and willfully abandoned AMH, by knowingly and willfully failing to provide any child support for AMH and by knowingly and willfully failing to visit AMH for four (4) consecutive

months immediately preceding the filing of the June 20, 2001,, Petition to Adopt and to Terminate Parental Rights.

271. The Court concludes that the Hes' willful failure to support AMH is not excused because there was no court order requiring support,[20] nor because the Bakers did not request support for AMH from the Hes.[21]

272. *Tennessee Code Annotated* § 36-1-113(g)(9(A)(ii), (iii), (iv), (v), and (vi): The Court concludes, by clear and convincing evidence that, at the time of the filing of the Petition to Terminate Parental Rights, Shaio-Qiang (Jack) He, was not the legal parent or guardian of AMH. The Court further concludes, by clear and convincing evidence, that Shaio-Qiang (Jack) He's parental rights should by terminated because:

(1) Mr. He has failed, without good cause or excuse, to make reasonable and consistent payments for the support of AMH in accordance with his ability to pay;

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[20] *State v. Mainer*, 1997 Tenn. App. LEXIS 755 (October 31, 1997). *perm. app. denied*, (October 31, 1997).

[21] *Bryant v. Bryant*, 1999 Tenn. App. LEXIS 72 (February 1, 1999); *In Re Satterwhite*, 2001 Tenn. App. LEXIS 257 (April 17, 2001).

(2) Mr. He has engaged in only token visitation with AMH;

(3) Mr. He has failed to manifest an ability and willingness to assume legal and physical custody of AMH; and

(4) Placing custody of AMH in Mr. He's legal and physical custody would pose a risk of substantial harm to the physical or psychological welfare of the child.

273. *Tennessee Code Annotated* § 36-1-113(g)(8)(B)(i) and (ii): The Court concludes that the evidence fails to establish, by clear and convincing evidence, that Mrs. He's mental condition is presently so impaired and is likely to remain so that it is unlikely that Mrs. He will be able to assume or resume the care of and responsibility for AMH in the near future.

274. *Tennessee Code Annotated* § 36-1-113(g)(8)(B)(i) and(ii): The Court concludes that the evidence fails to establish, by clear and convincing evidence, that Mr. He's mental condition is presently so impaired and is likely to remain so that it is unlikely that Mr. He will be able to assume or resume the care of and responsibility for AMH in the near future.

275. *Tennessee Code Annotated* § 36-1-113(g)(3)(A)(i), (ii) and (iii): The Court concludes that the provisions

of this section of the statute are inapplicable to this cause because AMH was not removed from Mr. He's custody by State action, rather Mr. He voluntarily relinquished custody and guardianship of AMH through a consent order awarding custody.

276. *Tennessee Code Annotated* § 36-1-113(g)(3)(A)(i), (ii) and (iii): The Court concludes that the provisions of this section of the statute are inapplicable to this cause because AMH was not removed from Mrs. He's custody by State action, rather Mrs. He voluntarily relinquished custody and guardianship of AMH through a consent order awarding custody.

C. Conclusions of Law on AMH's Best Interests

277. The Court concludes, by clear and convincing evidence, that AMH is a minor child of tender years, who has developed a strong psychological and emotional attachment to the Bakers, and that removal of AM H from the Bake rs would ca use substantial harm to AM H.

278. The Court concludes, by clear and convincing evidence, that the Bakers have provided AMH a safe, stable, healthy, loving environment for such a length of time that removal of AMH from that environment would cause substantial harm to AMH.

279. The Court concludes, by clear and convincing evidence, that continuation of any parentchild relationship between AMH and either Mr. or Mrs. He greatly diminishes AMH's chances of early integration into a safe, stable, and permanent home.

280. The Court concludes that the risks inherent in removing AMH from AMH's present circumstances substantially outweigh any risks posed by transcultural placement and loss of contact with AMH's biological parents, the Hes.

281. The Court concludes, by clear and convincing evidence, that there is parental misconduct or inability to parent by the Hes.

282. The Court concludes, by clear and convincing evidence, that both Mr. and Mrs. He are unfit parents, based on abandonment of AMH by both Mr. and Mrs. He.

283. The Court concludes, by clear and convincing evidence, that it is in AMH's best interest to terminate the parental rights of both Mr. and Mrs. He.

284. Applying the factors in *Tennessee Code Annotated* § 36-1-113(i)(1-9) for determining whether termination of parental rights is in the best interest of the minor child, the Court concludes, by clear and convincing evidence, that termination of the Hes' parental rights is in the best interest of AMH because:

(1) the Hes have failed to make such an adjustment of circumstance, conduct, and conditions as to make it safe and in AMH's best interest to be in the Hes' home:

(2) the Hes have failed to maintain regular, meaningful visitation and contact with AMH;

(3) the Hes have failed to establish a meaningful relationship with AMH due to the Hes neglect and inattentiveness;

(4) the effect of a change of caretakers and physical environment will have a negative and detrimental impact on AMH's emotional and psychological well-being;

(5) the physical environment of the Hes' home is unhealthy and unsafe;

(6) Mrs. Hes' emotional instability would be detrimental to AMH; and

(7) the Hes' have failed to provide anything more than token support for AMH, despite the Hes' ability to pay such support.

Based on all of the foregoing findings of fact and conclusions of law the Court finds that the petition to terminate the parental rights of Shaio-Oiang (Jack) He and Qin (Casey) Luo (He) is well taken and should be granted.

The Court finds that the petition to modify custody filed by Qin Luo (He) in the Juvenile Court for Memphis and Shelby County, Tennessee on May 29, 2001, is not well taken and should be denied and dismissed.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Petition to Terminate Parental Rights be, and the same is hereby, GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the parental rights of Shaio-Oiang He and Qin Luo (He) be, and the same are hereby, **TERMINATED.**

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Petition to Modify custody be, and the same is hereby, **DENIED** and **DISMISSED**.

The Court finds that there is no just reason for delaying the entry of this judgment. This judgment is made a final judgment, pursuant to T.R.C.P. Rule 54.02. The Court will hold the Petition For Adoption in abeyance until the Court's decision on the Petition to Terminate Parental Rights and the Petition to Modify are final.

_____

Chancellor by Designation

_____

Date

CERTIFICATE OF SERVICE

This is to certify that the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW was served upon counsel for the parties by placing a true and exact copy in the United States mail, postage prepaid, addressed to: Larry Parrish, Attorney at Law, (address), David A. Siegel, Attorney at Law, 5100 Poplar Avenue, Suite 2500, Memphis, Tennessee 38137, Richard A. Gordon, Attorney at Law, 264 Barry Road, Memphis, Tennessee 38117, Kimbrough Mullins, Attorney at Law, 50 North Front Street, Suite 1075 Memphis, Tennessee 38103,and Linda Holmes, Attorney at Law, 142 N. Third Street., 3rd Floor, Memphis, Tennessee 38103, on this the 12th day of May, 2004.

_____

Deputy Clerk

LAW AND ARGUMENT

ISSUE ONE:

DOES THE STANDARD OF REVIEW FOR THE TENNESSEE SUPREME COURT PURSUANT TO T.C.A. §27-1-113 PROVIDE IN PART THAT "[T]O THE EXTENT THAT THE FINDINGS OF THE CHANCERY COURT AND COURT OF APPEALS CONCUR, THEY SHALL, IF THERE BE ANY EVIDENCE TO SUPPORT THEM, BE CONCLUSIVE UPON ANY REVIEW OF THE FACTS IN THE SUPREME COURT...."?

This is an appeal from a judgment of the Chancery Court of Shelby County that has been reviewed by the Court of Appeals. Tennessee Rule of Appellate Procedure 13 provides that "unless otherwise provided by statute" review of findings of fact is *de novo* with a presumption of correctness. This was the standard applied by the Court of Appeals in this case. But to the extent the Court of Appeals concurred in the factual findings of the Chancery Court, a different standard now applies.

The applicable standard of review is set out in T. C. A. § 27-1-113, which provides in pertinent part that "[t]o the extent that the findings of the chancery court and the court of appeals concur, they shall, if there be any evidence to support them, **be conclusive** upon any review of the facts in the Supreme Court . . . ." **Id.** **[Emphasis added.]** This statute

was passed "to relieve the Supreme Court of the investigation of questions of fact in Chancery cases and give to the Supreme Court the benefit of findings by the Court of Appeals. ***McCalla v. Rogers***, 116 S.W.2d 1022 (Tenn. 1938). The provisions of the statute are mandatory. *Id.* If there is any material evidence to support a concurrent finding of fact, the Supreme Court is bound "not only as to that finding but as well to an inference or conclusion reasonably drawn from the evidence that it is a fact." ***Hoover Motor Exp. Co. v. Clements Paper Co.***, 241 S.W.2d 851 (Tenn. 1951). Also see ***Cary v. Cary***, 937 S.W.2d 777 (Tenn. 1996) (in divorce case Supreme Court is bound by concurrent finding of lower courts that wife entered into prenuptial agreement freely and knowledgeably.)

Under this standard of review, the guardian *ad litem* submits that the following findings of fact are conclusive for purposes of this appeal:

1. The Hes understood and knowingly executed the consent order transferring custody of AMH to the Bakers.

2. The Hes willfully failed to visit AMH during the four-month period preceding the filing of the petition to terminate the Hes' parental rights.

3. The Hes have failed to develop any meaningful relationship with AMH.

4. Removing AMH from the custody of the

Bakers and her current environment would likely cause substantial harm to AMH.

Material Evidence Supports Concurrent Finding That The Hes Understood And Knowingly Executed The Consent Order Transferring Custody Of AMH To The Bakers

There was a concurrent finding of fact by the Chancery Court and the Court of Appeals that the Hes understood and knowingly executed the consent order transferring custody of AMH to the Bakers. (Chancery Court Finding [hereafter CC] No. 126, 127; Court of Appeals Opinion [hereafter COA] at *38, 58) The following material evidence supports this finding.

Prior to execution of the consent order the Bakers and the Hes agreed that the Bakers would have custody of AMH until she reached the age of eighteen. (CC No. 102; COA at *72, n.30)

Prior to execution of the consent order Attorney Kevin Weaver held a meeting attended by Mr. He where the legal ramifications of the consent order were fully explained. (CC No. 106-110; COA at *59)

Mrs. He was aware of this meeting and the purpose of the meeting and voluntarily chose not to attend the meeting. (CC No.107; COA at *53)

Prior to execution of the consent order Diane Chunn, a counselor with Mid-South Christian Services, and an interpreter met with Mrs. He at her apartment and explained everything said at the meeting with Mr. Weaver. Mrs. He had no questions. (CC No.112; COA at *53)

On the day the consent order was executed, but prior to the execution of the order, Sarah Cloud, a counselor with Juvenile Court, and an interpreter met with Mrs. He and explained the petition to transfer custody and the consent order. (CC No. 119; COA at *8, 53)

Both Mr. Weaver and Ms. Cloud explained that if there were any dispute regarding custody of AMH, the Hes would have to petition the court to regain custody. (CC No.121, 127, 128; COA at *59)

Around the time of the execution of the consent order the Hes had consulted with and had access to numerous attorneys regarding other legal matters but never asked for counsel or advice regarding AMH or the consent order. (CC No. 61-66; COA at *53)

Material Evidence Supports Concurrent Finding That The Hes Willfully Failed To Visit AMH During The Four-Month Period Preceding The Filing Of The Petition To Terminate The Hes' Parental Rights

There was a concurrent finding of fact by the Chancery Court and the Court of Appeals that the Hes willfully failed to visit AMH during the four-month period preceding the filing of the petition to terminate the Hes' parental rights. (CC No.175; COA at *74) The following material evidence supports this finding.

At the end of the initial foster care period the Hes asked the Bakers to raise AMH until she was eighteen, but the Hes wanted to retain their parental rights in order to remain in the United States. (CC No. 101-102; COA at *72, n. 30)

Shortly before filing the first petition to modify the consent order transferring custody of AMH to the Bakers, Mr. He was contracted by immigration officials regarding their status. (CC No.140; COA at *74)

After filing the first petition to modify the consent order, Mr. He met with Mr. Baker to discuss the petition and suggested several options regarding the custody of AMH. One of the options included the Bakers promising to refrain

from any action that would cause the Hes to be deported. (CC No. 142; COA at *74)

The Court Appointed Special Advocate assigned to investigate the first petition to modify the consent order reported a concern that the Hes were seeking to regain custody of AMH to avoid deportation. (CC No. 145; COA at *74)

On January 28, 2001 the Hes created a disturbance while at the Baker's home, and the police were called. The officer who responded told the Hes not to return to the Baker's house **that day**. (CC No.150, 151, 152; COA at *70, 72)

It is undisputed that after January 28, 2001, the Hes did not visit or contact the Bakers regarding visitation for a period in excess of four months immediately preceding the filing of a petition to terminate the Hes' parental rights. (CC No.174; COA at *70, 72)

The Hes stated reason for failing to visit, fear of arrest or harm if they returned to the Baker's home, is not credible. (CC No.153; COA at *70, 72; COA Dissenting Opinion at *95)

The police had previously been called to the Baker home more than once due to the behavior of Mrs. He, yet the Hes continued to visit after these occasions. (CC No.153; COA at *70, 72)

The Bakers were willing to allow the Hes to visit AMH after the January 28 incident. (CC No.180; COA at *71, 72)

The only contact from the Hes between the January 28 incident and the filing of the petition to terminate parental rights was on April 2, 2001 when Mrs. He left a message on the Baker's telephone answering machine regarding a baby bed the Bakers had loaned to the Hes. Mrs. He did not inquire about AMH or ask for visitation. (CC No. 184; COA at *71, 72)

Mrs. He signed a second petition to modify the consent order on April 9, 2001 that was filed in the Juvenile Court on May 29, 2001. (CC No.187; COA at *71, 72)

Around the time of the second petition to modify the consent order, immigration officials had again contacted Mr. He. (CC No.186; COA at *71, 72)

Mrs. He did not include a request for visitation in the second petition to modify the consent order. (CC No.187; COA at *71, 72)

Material Evidence Supports Concurrent Finding That The Hes Have Failed To Develop Any Meaningful Relationship With AMH

There was a concurrent finding of fact by the Chancery Court and the Court of Appeals that the Hes have failed to develop any meaningful relationship with AMH. (CC No. 218; COA at *84) The following material evidence supports this finding.

AMH was born on January 28, 1999. (CC No. 19; COA at *84)

The Hes voluntarily placed AMH in the care of the Bakers on February 24, 1999. (CC No. 88; COA at *84)

The Hes visited with AMH a total of approximately twelve hours during the first three months of her life. (CC No. 94; COA at *83)

Between June 4, 1999 and January 28, 2001 (the last time the Hes visited AMH) the Hes visits with AMH lasted approximately one hour and totaled approximately eighty hours. (CC No. 191; COA at *83)

After entry of the consent order transferring custody to the Bakers on June 4, 1999 the Hes requested that AMH call the Bakers "mommy" and "daddy" and refer to the Hes as "Jack" and "Casey," and AMH has done so since that time. (CC No. 131; COA at *84)

Material Evidence Supports Concurrent Finding That Removing AMH From The Custody Of The Bakers And Her Current Environment Would Likely Cause Substantial Harm To AMH

There was a concurrent finding of fact by the Chancery Court and the Court of Appeals that removing AMH from the custody of the Bakers and her current environment would likely cause substantial harm to AMH. (CC No. 213, 231; COA at *84) The following material evidence supports this finding.

AMH has been in the continuous custody of the Bakers since February 24. 1999. (CC No.92, 214; COA at *84)

AMH views the Bakers as her psychological parents and has a high level of attachment to them. (CC No. 210, 212, 232; COA at *84)

AMH has a high level of attachment to the Bakers other children. (CC No. 217, 230; COA at *84)

Expert testimony demonstrates that if AMH were removed from the Bakers, she would likely experience separation anxiety and could develop other psychological disorders. (CC No. 210; COA at *84)

If the Hes regained custody of AMH and returned to China she could suffer adverse consequences as a result of the Chinese "one-child" rule. (CC No. 235; COA at *85)

The Hes questionable character reflected by their repeated defiance of legal authority and numerous untruthful statements could have an adverse effect on AMH. (CC No. 238-248; COA at *85)

Juvenile Court Hearing April 11, 2007

THE COURT: Larry, do you have other questions for Dr. Collins, [court-appointed psychologist]?

MR. PARRISH: I do. ....

[P]resuppose a situation where you had worked through to the point that there was a reunification with the Hes, and then at some future time there were a ruling by a court that required you to disunify from the Hes and reunify back to the Bakers, what kind of stress factors or variability, what effect would that have on her?

DR. COLLINS: Well, I think on any child that sort of disruption and uncertainty about where home is going to be – **would be extremely stressful**. Anna, as I said, she is a little girl who values predictability. She likes to know what the structure is, what the expectations are. **She is much more structure bound than many children are**, so for her that **would be particularly difficult** to have that much uncertainly about where she is supposed to be.

MR. PARRISH: The Court has instructed that she be reunified with the minimal amount of trauma. I'd like to focus on what trauma is.

What are the – what is a one to ten as far as trauma? Are there some traumas, hypothetically, if you were to foresee that the minimum amount of trauma will result in a high likelihood she will have an eating disorder, for instance, is that an amount of trauma that you could say, well, this is the minimum I can get to, or how do you measure what is minimum?

What are the standards?

How do you define "trauma?"

What are the results and effects of trauma in a child?

DR. COLLINS: That is such a broad question, I will try and just answer it in terms of the situation that Anna is in now.

The good news is that children are much more resilient than many of us would expect. That doesn't mean that the **pain they feel when** they are **going through a loss or a trauma** or a transition **is** not **powerful**. You have to **see a child suffer**.

In terms of your hypothetical **child**, the most –the **most painful thing for them to contemplate is a loss of their parents**. So loss in terms of family **is traumatic** for any child, **and that is right now where Anna is**. **She is anticipating or imaging** what it would be like not to be with the family that she has grown up with, and that is extremely difficult for her.

That is **not to say**, then, that she is – that she is in **any** way **doomed** to any kind of particular problem down the road, **but** it **sure does** – it would **make all adults want to be very sensitive to where she goes from here**. (emphasis added)

IN THE JUVENILE COURT OF
MEMPHIS AND SHELBY COUNTY, TENNESSEE

IN THE MATTER OF:
Anna Mae He, DOB: 01/28/99, P.A. 8
A Child under Eighteen (18) years of age

Docket NO. K6770

EXCERPT OF PROCEEDINGS

WHEREUPON, on this the 11th day of April, 2007 at 1:30 p.m., in the Juvenile Court of Shelby County, Tennessee, the above-styled cause came on to be heard before the Honorable Curtis Person, judge presiding when and where the following proceedings were had, to-wit:

LU ANNE DUDLEY, CSR, RPR
99 NORTH MAIN, SUITE 701
MEMPHIS, TENNESSEE 38103
(901) 525-1022

April 11, 2007

1:30 p.m.

(Excerpt of proceedings)

* * * * * *

THE COURT: Larry, you said you have a motion. Do you want to go into that today?

MR. PARRISH: Well, I do, Your Honor. Actually, May 9th might be the 90th day. By then I will have to have filed my petition for certiorari if it is going to be filed. And my concern is the concern that I expressed, and it is getting to be a very urgent concern at this point.

In my petition to the Tennessee Supreme Court on February 2, 2007 to rehear the case I had a section in that, a very short section in that petition that I headed "Rendering AMH Lawyerless."

And I pointed out that while the United States Supreme Court has recognized that children in custody . . . .

THE COURT: Ms. Stephens?

MS. STEPHENS: Thank you, Your Honor. The order from the Tennessee Supreme Court said that the reunification was to occur with the least amount of trauma to this child to reunify her with her birth parents.

Your Honor graciously appointed me and appointed Dr. Collins, and I think that the orders that appointed us were clear. And Mr. Parrish is correct, we did talk, and he is correct in giving a summary of what I told him in that I feel that my

duties have been outlined in the order that appointed me as the guardian ad litem in this case. And I think Dr. Collins' duties have been outlined in the order that appointed her in this case.

And our duties are to cause the reunification to happen in the manner that causes the least amount of trauma to child, and that is what we have been trying to do, consistently trying to do since we were appointed on this case.

So I think any activities outside of that role, any writs of habeas corpus, any applications for certiorari would be outside of the order that appointed me, Your Honor, and that is my professional opinion on that.

I defer to Your Honor, if Your Honor decides to appoint an attorney ad litem on this matter. You know, these visits have been proceeding fairly well. I mean, you know, no one thought that this would be easy.

Are we going to leave this with absolutely zero trauma to this child? No, we are not. I think we all know that.

Has the child exhibited such trauma that Dr. Collins is having to go out to all sorts of experts in areas to say this child is acting out, she is now failing school, she is not eating, these things are happening that are horrible? No, those things aren't happening.

Are these visits difficult for the child? Yes, they are.

Do they start out at times with her crying, or does she leave crying, does she get agitated? She does.

But we have not crossed that bridge. That is not what is happening, and that is not what we are reporting to Your Honor. I'm glad that is not what we are having to report to Your Honor, very much so but I think we are doing what Your Honor appointed us to do. And I will just defer to the Court as to any attorney ad litem being appointed.

I will say this. Mr. Parrish knows how I feel about this. If a writ of certiorari is going to be filed, I would beg that it be filed outset, that this Court is under a very specific order, specific in one way, and it has the Court has wide discretion in another way. The specific - - because the Court in reading from the order of the Supreme Court said that "We conclude that physical custody of AMH must be returned to the parents." Then I'm going to read what has already been stated by you and by others, Mr. Parrish. "The juvenile court of Shelby County is directed to consider, prepare, and implement a plan to resolve the pending custody matter with a view towards reunification of AMH with the natural parents, Jack He and Casey Lual -- I believe He now -- in a manner that minimizes trauma to the child."

The Court appointed Ms. Stephens as guardian ad litem. The Court did not choose to appoint an attorney ad litem. The Court is, as the Court has already expressed, very satisfied with what Ms. Stephens is doing. The Court believes that she is functioning exactly as the Court intended for her to function.

But to grant your motion would take this Court beyond the scope of what this Court is supposed to be doing. I believe that the only thing before this Court by order of the Supreme Court is for me to carry out this reunification process, this transition process, in the least traumatic way possible.

And, again, I have appointed Ms. Stephens. I appointed Dr. Collins to facilitate in carrying out that transition, that reunification. And I do not want to relitigate, relitigate what went before the Tennessee Supreme Court.

The Tennessee Supreme Court has ruled. I believe that is all I have in front of me and, therefore, I deny your motion.

MR. PARRISH: Okay. And I take what you said by that is that you agree with what Ms. Stephens said about her interpretation of the limits on her appointment that is, she doesn't have the authority to be investigating these legal issues, et cetera?

THE COURT: That is what I meant by what I said. Ms. Stephens' role has been clearly defined by this Court, and she is functioning as this Court anticipated she would. And I don't -- I'm not, based on the order from the Supreme Court and what I've stated, I do not feel that it is appropriate to expand her role.

In all cases tried on the facts in a chancery court and afterwards brought for review to the court of appeals, the court of appeals shall, to the extent that the facts are not stipulated or are not concluded by the findings of the jury, make and file written findings of fact, which thereupon shall become a part of the record. Before any such findings shall become final, reasonable opportunity shall be afforded the parties to examine the findings and to ask for different or additional findings. Where there has been a concurrent finding of the master and chancellor, which under the principles now obtaining is binding on the appellate courts, the court of appeals shall not have the right to disturb such finding. To the extent that the findings of the chancery court and the court of appeals shall concur, they shall, if there be any evidence to support them, be conclusive upon any review of the facts in the supreme court; to the extent that they do not concur, they shall be open to examination in that [supreme] court. The court of appeals shall not be limited to the

consideration of such facts as were found or requested in the lower court, but it shall independently consider and find all material facts in the record; and either party, whether appellant or not, may assign error on the failure of the chancellor to find any material fact, without regard to whether such fact was found or requested in the lower court. This shall not apply to any case tried in the chancery court upon oral testimony. 1972 Pub.Acts, c. 565, § 2. (emphasis added)

Quote From *In re Jasmon O. v. Gavin O.*
878 P.2d 1297 (Cal. 1994) reh. den. October 27, 1994

The child's treating psychologist, **Dr. Lincoln**, testified that he **halted** progress of the **transition** plan from one phase to the next **because** of the **increasing anxiety** Jasmon exhibited when exposed to longer and more frequent visits with her father. Even when visitation was reduced, she exhibited **anxiety**, and when the father told her she was coming to live with him permanently she developed serious **"high intensity" anxiety** symptoms. Dr. Lincoln diagnosed Jasmon as having developed a **separation anxiety disorder** that she did not have before the transition plan, and testified that her **long-term prognosis** if the **transition** plan were **resumed** would be **depression** and **difficulty forming relationships**. He also expressed concern at the father's apparent lack of recognition that Jasmon was experiencing **significant anxiety and pain** during this period, and testified confidently that the **father** would **aggravate her trauma if** the court did **not end** the **transition** from the A's to the father. He testified that his opinion against

placement with the father was stronger than it had been at the earlier hearing because **his [Dr. Lincoln] fears, originally** based on **hypothesis**, had been **borne out** by events.

Dr. Murphy, a child psychologist, **agreed with** Dr. **Lincoln** that Jasmon was suffering from a mental disorder, namely, **separation anxiety disorder**. He was of the opinion that the disorder was **caused by** Jasmon's **attachment to** her **foster parents** and the natural father's inability to deal empathetically with that attachment during the transition and to evoke any attachment to himself. He was of the opinion that **to continue** with the **transition** of her custody from the A.'s to the father would **cause her serious lifelong** emotional detriment.

Finally, **Dr. Callan,** a psychoanalyst and expert in the field of child psychology who had no previous contact with the case, testified in the **strongest terms** that **during** the period of the **transition** plan Jasmon had developed a **serious mental illness**. She diagnosed Jasmon as suffering from **separation anxiety and depression**, and

testified that this condition was not simply situational but had become a fixed personality disorder because of the trauma Jasmon had experienced in attempting to make the transition from the A.'s to her natural father. The doctor testified that "this child is deeply afraid," and that the child's problems were not caused so much by separation from the A.'s, but by the child's fear that her emotional needs would not be met by her natural father. The doctor testified that "[s]he simply cannot tolerate more stress and particularly cannot tolerate an arrangement that is going to create a major loss." Dr. Callan was of the opinion that the child's depression would not be resolved within the next year and warned against transferring the child's custody to any person who could not empathize with her and recognize how upset and disturbed she was.

In addition, there was evidence that Jasmon had exhibited extreme anxiety to her caregivers during the transition plan, developing irrational fears, anger, difficulty relating to peers and disruption

of toileting and **sleeping patterns**. She also developed **violent fantasies** involving her kidnapping.

Even the **father's psychologist**, who found the father to be an adequate parent, **agreed** with the other experts that **Jasmon was too** [at 1306] **fragile to be transferred** to her father's custody in the near future.

The above evidence, **all** directed to **events** occurring **after** the **second permanency planning order**, **overwhelmingly demonstrated** that the previous **order** was not in the child's best interests because its execution **caused** her to **develop** a **mental illness**.

***

We have **no quarrel** with the assertion that the **existence** of a successful **relationship** between a foster **child and foster parent** cannot be the **sole basis for terminating** parental rights or depriving the natural parent of **custody** in a dependency proceeding. The **evidence here was of a different order. It established that the**

severing of the bond with the foster parents would do serious, long-term emotional damage to Jasmon.

***

[at 1307] [a]fter an extended period of foster care, it is within the court's discretion to decide that a **child's interest** in stability has come to **outweigh** the **natural parent's interest** in the care, custody and companionship of the child.

[t]he **right** is not absolute and **may be abridged when** it is necessary to do so to **protect the welfare** of the **child**. (citation omitted).Thus, in this case, no one would dispute that it was necessary to abridge the natural father's right to the care and companionship of his child when she was placed **in** the **foster home**, and for an **extended period** thereafter, because the father was unable to care for the child.

Children, too, have fundamental rights- including the fundamental right to be protected from neglect and to "have a **placement that is stable [and] permanent.**

(multiple citations omitted). **Children** are **not** simply **chattels** belonging to the parent, but **have fundamental interests of their own that may diverge from** the interests of the **parent**. (citations omitted)

***

[c]hild has spent a substantial period in foster care and **attempts at reunification** have proved **fruitless**, the **child's interest** in stability **outweighs** the **parent's interest** in asserting the right to the custody and companionship of the child.

[d]etriment to the **[child's] physical or emotional well-being."**

***

[at 1308] In view of the **child's constitutional** and statutory **interest in stability** (citations omitted) ... **outweighs** the **parent's interest** in the care and custody of the child **after 18 months of out-of-home** placement... is in the child's best interests... .

[e]vidence that **disruption** of the bond **with foster parents will cause** the child **serious, long-term** [at 1309] **emotional damage** may **be crucial** in ascertaining the best interests of the child. (emphasis added)

Smith v. City of Fontana

818 F.2d 1411 (9th Cir. 1987)

[at 1418] The **Supreme Court** has **yet to address whether** and when the government's act of **taking the life of one family member deprives other family members** of a cognizable liberty interest in continued association with the decedent. **Our court**, however, **has** held that parents can challenge under section 1983 a state's severance of a parent-child relationship as interfering with their liberty interests in the companionship and society of their children. In *Morrison v. Jones*, 607 F. 2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962, ... (1980), we held that when county officials removed a mentally ill boy from this mother's custody on the ground that she could not adequately care for him, the **mother** could **bring** a **section 1983** action for damages to **vindicate her 'substantive familial rights that have long been considered the '" basic civil rights of man.'"** *Id.* At 1276 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541, ... (1942)). More recently, in *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985), we

held that parents who alleged that school officials negligently allowed their son to commit suicide could maintain a section 1983 action to **vindicate** 'their **fundamental parental rights** guaranteed by the **Ninth Amendment** ... (ellipsis in original) and ... (ellipsis in original) their **right to association with** their **son** guaranteed by the **First Amendment**.' *Id.* At 653. After examining a **long line** of **Supreme Court cases stressing** 'the importance of **familial bonds**' and identifying the many times the Supreme Court has interpreted the **due process clause** to protect the interests of parents 'in maintaining a **relationship with** their **children**' *id.* At 654, we concluded that 'a parent has a constitutionally protected liberty interest in the companionship in society of his or her child.' *Id.* At 655. [Fn. 9]

***

[Fn. 9]. After *Kelson* was decided, the Supreme Court ruled that the 'Due Process Clause is simply not implicated by a *negligence* act of an official causing intended loss of or injury to life, liberty or

property.' *Daniels* [*v. Williams*], 106 S.Ct. at 663. Although *Daniels* overrules *Kelson's* implicit holding that a section 1983 claim can be based on mere negligence, *Kelson's* determination that parents have a constitutionally protected **liberty interest** in their **continued association** with their **children** remains **good law**.

***

[at 1417] The **children** also plead that the defendants violated their personal '**rights not to be deprived of** the life of their **father and not to be deprived of his love, comfort and support** ... (ellipsis in original).' *Complaint*, at ¶ 40. This claim raises the threshold question **whether** the **children's interest in** the **continued companionship and society** of their [at 1418] father is a **cognizable liberty interest** under the **due process clause**.

***

We now **hold** that this constitutional **interest in familial companionship and society** logically **extends to** protect **children from unwarranted** state

interference with their **relationships with their parents**. The companionship and nurturing **interests** of a parent and child in **maintaining a tight familial bond** are reciprocal, and we see no reason to accord less **constitutional value** to the child-parent **relationship** than we accord to the **parent-child relationship**. [Fn. 10] Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20, ... (1984)('**Family relationships**, by their nature, involve **deep attachments and commitments** to the necessarily **few** other **individuals** with whom one shares not only a **special community** of thoughts, experiences, and beliefs but also **distinctively personal** aspects of one's life').

***

[Fn. 10]. Indeed, if any distinction can be drawn, one might even argue that a **child has a *greater*** (italics in original) **interest** in the continued life of a biological parent than vice versa because often the parent has or can have other biological children, whereas a child can never replace a biological parent.

***

[at 419] **When**, as in this case, a **child claims constitutional protection** for her relationship with a parent, there is **no custodial interest implicated**, but only a companionship interest. This distinction between the parent-child and the child-parent relationship does not, however, justify constitutional protection for one but not the other. We hold that a **child's interest in her relationship** with a parent is **sufficiently weighty** by itself to **constitute** a cognizable **liberty interest**. (emphasis added)

***

Thus, the **familial relationship**, and not the more narrow custodial interest of parents, **give rise** to the **due process** action. See also *Bell*, 746 F.2d at 1245 (parent can assert personal due process claim for death of adult child because the 'Supreme Court's decisions protect more than the custody dimension of the parent-child relationship'); *cf. Moore v. City of East Cleveland*, 431 U.S. 494, ... (1977) (**extending Supreme Court principles** protecting the **parental**

role in raising children to protect a broader set of relationships within the family structure and invalidating under substantive due process a zoning ordinance preventing grandmother and grandson from living together in certain circumstances). (footnote omitted)

***

This leaves us with the question of whether the alleged interference with the children's protected liberty interest rises to the level of a substantive, as opposed to a procedural, due process violation.

***

[at 1420] Such an action constitutes the very sort of affirmative abuse of government power which the substantive protections of the due process clause are designed to prevent. Therefore, the same allegation of excessive force giving rise to Mr. Smith's substantive due process claim based on his loss of life also gives the children a substantive due process claim based on their loss of his companionship. (footnote omitted) Because of these facts their claim

invokes the protections of substantive due process, ... (emphasis added)

Sorentino v. Family & Children's Society of Elizabeth
367 A.2d 1168, 1170 (N.J. 1976)

> [O]rdinarily, the foregoing conclusions would call for an **affirmance** of the judgment of the Appellate Division **and an immediate vesting of custody of the child** in the **natural parents**. We are given pause, **however,** in adjudicating such a summary and drastic change in the life circumstances of this child now 31 months old. We are **confronted with** the **potentiality of serious psychological injury to the child**, in the evaluation of which **substantial significance** should attach to the **length of time the child has been with the prospective adopting parents and to the quality of the developing relationship.** See Commonwealth ex rel. Bankert v. Childrens's Services. 224 Pa.Super. 556, 307 A.2d 411 (Super.Ct.1973); Note, 'Increasing the Rights of Foster Parents,' 36 U.Pitt.L.Rev, 715, 723 (1975). Cf. In re Adoption of a Child by R.D., supra, 127 N.J.Super. at 316, 317 A.2d 382; In re P., and wife, 114 N.J.Super. 584, 593 Et Seq., 277 A.2d 566 (App.Div.1971); Note,

'Alternatives to 'Parental Right' in child Custody Disputes Involving Third Parties,' 73 Yale L.J. 151, 158 Et *132 seq. (1963). We are not suggesting that such a potentiality suffices as a matter of law to justify a reversal in this case. However, the **potentiality** does **require a hearing and determination on the issue**.

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[T]he **argument is that a fortiori the parent cannot be cut off from the child by a void formal surrender, on the basis of the supposed best interest of the child.**

However, it should be made clear the we **did not** in D., supra, **hold** that the **right** of **custody over a child by a non-forsaking parent was necessarily inviolable as against a showing of the probability of serious harm to the child if such custody was awarded.** The intent of **our holding** in D. was that a **mere** demonstration that the **child** would **be better off** with the adopting than the natural parent would **not warrant** a judgment of adoption where the natural parent had not forsaken his obligations to

the child. This would also apply when, as here, there is a void formal surrender of custody by a parent.

[T]he court cannot evade its responsibility, as parens patriae of all minor children, to preserve them from harm.

***

[T]he possibility of serious psychological harm to the child in this case transcends all other consideration. The court's responsibility in the matter is not lessened by the circumstance that plaintiffs are not alone responsible for the delay (although this suit was not commenced until 14 months after the infant's birth), for the appeals and stays are at least as direct a contributing cause of the critical situation confronting the child.

Sorentino v. Family & Children's Society of Elizabeth, 378 A.2d 18 (N.J. 1977) at 20:

Plaintiffs' next contention is couched in **federal constitutional terms,** the argument being that this **Court** has **denied the petitioners their Ninth and Fourteenth Amendment rights** by depriving them of 'the presumption of a primary right to the **custody** of their natural child and impos(ing) the **burden of proving that no serious psychological harm** would come to the child upon transfer to the natural parents.' **Assuming** arguendo, that such a **right** may be found in the Constitution (see, e.g., Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); Griswold v. Conn., 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)), assuredly it is **not absolute**. Indeed, plaintiffs appear to concede as much in their brief by conditioning any such primary right to custody on the absence of 'some overriding consideration (which) dictates a termination of that right.' Just such an **overriding consideration** was projected in

the first appeal in this case the **'potentiality for serious psychological harm'** resulting from a transfer of custody from the intending adoptive parents to the natural parents **in view of the substantial period of time that the child had been in the only real home she had known.** Sorentino I, supra, 72 N.J. at 133, 367 A.2d 1168. The whole point of the remand was to determine **whether that risk would likely become a reality.** On this issue the trial judge found, as we have already observed, not only that **plaintiffs** had **failed** to sustain their **burden** of **proving** that such a **transfer would 'not raise the probability of serious psychological harm to the child,'** but further than the **'convincing evidence' was to the contrary of that proposition.**

As part of this **argument** plaintiffs complain that they **should not have had to bear the burden** of proof on the issue of serious harm to the child ... apparent that no matter where the burden of proof lay, the trial judge would have reached the same conclusion ... he **did find** the **testimony of defendants'**

experts 'persuasive and convincing.' [w]hether the burden of proof was properly shouldered by plaintiffs **becomes academic.**

***

[T]he **overwhelming evidence, including the testimony, the medical and scientific authorities, and the legal literature on the subject, supports the trial court's conclusion.** One **excerpt** ... . They were unanimous in their opinion that **if transfer** of custody were ordered, it would not only be beset with **immediate serious psychological and emotional harm** to the child, but that also there was a **strong likelihood** and a potential for such harm to **continue throughout her lifetime,** characteristics being that the child would suffer acute depression, act out with rebellious conduct and suffer feelings of anxiety, fearfulness, insecurity and inadequacy. They further agreed that although **professional help** is available, at most it would **only ameliorate the harm** but would **not eradicate it.** (emphasis assed)

CONCURRED-IN FACTS CHART

Trial Court	Court of Appeals	Supreme Court
29. All parties, including **Mr. and Mrs. He, knowingly and voluntarily signed** the June 4, 1999, Consent Order Awarding Custody, **without** being induced by any fraud or **undue influence**.	Beginning with the due process claims, the **trial court made the following relevant findings**:...	
67. On June 2,1999, attorney Kevin Weaver met with **Mr. He** and the Bakers and fully advised Mr. He and the Bakers of the **legal ramifications** of filing a petition for custody and of signing a consent order awarding custody of AMH.	**Father** subsequently **confirmed** that Mr. **Weaver did indeed tell him** that, once they signed a consent order giving the Bakers custody of A.M.H., they would have to go before a court to obtain a change in custody.	

Trial Court	Court of Appeals	Supreme Court
Mrs. He, after being fully advised of the meeting and of the purpose of the meeting by Mr. He, waived her right to be present at the meeting and told Mr. He to tell the others at the meeting that she was ready to proceed. Mr. Weaver answered all of Mr. He's and the Bakers' questions during the meeting. Mr. He later advised Mrs. He of the information that Mr. Weaver imparted at the meeting.		
68. … **Ms. Chunn explained** to	On April 7, 2004, the chancery court entered an order	

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Trial Court	Court of Appeals	Supreme Court
Mrs. He the things that Kevin Weaver had said to Ms. Chunn, the Bakers, and Mr. He, the day before in the meeting in Mr. Weaver's office. **Mrs. He** indicated that she **understood** everything that Ms. Chunn had told her through Mr. Yao.	denying the Hes' first motion concluding, in relevant part, as follows: The Consent Order Awarding Custody, signed by both Respondents, entered in Juvenile Court on June 4, 1999, states that the parties were fully advised of their legal rights. The Court finds that Mr. He was fully advised of his legal rights by Attorney Weaver. The Court also finds that Mrs. He voluntarily waived her right to receive legal advice by not attending the meeting, by telling	

Trial Court	Court of Appeals	Supreme Court
	Mr. He that she was ready to proceed, and by relying on Mr. He to communicate Attorney Weaver's explanation of the parties' rights to her. Thus, the Consent Order Awarding Custody entered on June 4, 1999, is not facially defective, nor is it void ab initio or voidable pursuant to Rule 60.02(3) and (5) of the Tennessee Rules of Civil Procedure.	
69. On June 4, 1999, Ms. Sarah Cloud, with the assistance of qualified interpreter, privately met with Mrs. He,	**Both parties presented testimony** addressing the issue of whether the Hes understood the purpose and effect	

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Trial Court	Court of Appeals	Supreme Court
without Mr. He, and fully explained the legal ramifications of both he Petition For Custody and the Consent Order Awarding Custody, both of which **Mrs. He later voluntarily signed**.	of the June 4,1999 consent order awarding custody of A.M.H. to the Bakers. Based on the testimony offered at trial, the **chancery court held that the Hes were adequately informed of** the order's purpose and effect, and the Hes either had adequate counsel or had an opportunity to seek counsel regarding this issue. **We give these credibility determinations great weight on appeal, and we find no clear and convincing evidence in the record to justify reaching a different conclusion**	

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Trial Court	Court of Appeals	Supreme Court
	regarding such testimony.	
93. The Hes made their decision concerning the care, custody, and control of AMH. No one forced the Hes to relinquish care, custody, and control of AMH to Mid-South Christian Services, or to the Bakers. The **Hes voluntarily exercised** their fundamental right as parents to transfer custody of AMH to the Bakers.	**[A]s the trial court noted** in its order, the Hes had access to legal representation (as evidenced by the various attorneys representing them in their civil and criminal matters) both before and after the June…	
102. … Mr. He then told the Bakers that both **Mr. and Mrs.**	At the conclusion of the initial three month foster care period, the Hes	

Trial Court	Court of Appeals	Supreme Court
He wanted the Bakers to take and raise AMH. The Bakers then agreed to custody, rather than adoption with the Hes still retaining their parental rights, because the Bakers were afraid of what might happen to AMH if they did not agree to take custody of, and raise, AMH.	signed a "Petition for Custody," wherein they asked that "[custody of [A.M.H.] be awarded to Jerry & Louise Baker, non-relativef (sic).]" On June 4, 1999 the juvenile court entered a "Consent Order Awarding Custody," wherein the juvenile court noted that the Hes admitted the following: 1. That they have been fully advised of their legal rights and that a hearing before the Court is hereby expressly waived. 2. That all parties agree that it is in the best interest	

Trial Court	Court of Appeals	Supreme Court
	of the child(ren) for custody *and guardianship of the person of said child to* be awarded to Jerry and Louise Baker, non-relatives.	
103. ... Ms. Chunn got the impression from her conversation with Mr. He and Mrs. Baker that the **Hes** and the Bakers had **agreed** that the Bakers would raise AMH.	**The chancery court concluded that "[a]ll parties, including Mr. and Mrs. He, knowingly and voluntarily signed the June 4,1999, Consent Order** Awarding Custody, without being induced by any fraud or undue **influence**." All of the **arguments** put forth by **Mother on appeal** addressing this issue **fail to demonstrate how the trial court erred in finding a**	

Trial Court	Court of Appeals	Supreme Court
	lack of fraud in the inducement of the order.	
110. Mr. **Weaver** also **explained** to Mr. He the risk that if a temporary custody order was entered, a court would have to decide if there was a contest about the Hes **regaining custody** of AMH. Mr. Weaver explained that anyone who gives up even temporary custody takes the **risk** that they may not get custody back. Mr. Weaver also explained that a court would look at whether there	The **trial court concluded** that, based on the evidence at trial, Ms. Chunn, Ms. Cloud, and Pastor Yau "fully explained the legal ramifications of both the Petition for Custody and the Consent Order Awarding Custody, both of which Mrs. He later voluntarily signed."	

Trial Court	Court of Appeals	Supreme Court
was a change of circumstances, and what was in the child's best interest in deciding whether to allow a change in custody.		
119. ... **Mrs. He said that she understood** what Ms. Cloud had said during this meeting, and she made **no statements** to Ms. Cloud, Mr. Yao, or Ms. Chunn that she did **not understand** everything that Mr. Yao told her.	In light of the testimony of the Bakers, Mr. Weaver, and Ms. Chunn to the contrary, **the trial court concluded** that the call did, in fact, take place, and Mother waived her right to attend.	
121. After the private conference with Mrs. He, Ms. **Cloud talked to**	**The trial court's findings** in relation to this issue are based solely upon the	

Trial Court	Court of Appeals	Supreme Court
both Mr. and Mrs. He and told the Hes that if the Bakers later refused to return custody of AMH to them that the Hes would have to go to court and let a judge decide whether the Hes could have custody of AMH returned to them.	credibility of the witnesses. **The record does not contain clear and convincing evidence that Mother lacked knowledge** as to the consequences of the transfer of custody.	
122. ... Ms. Cloud had no doubt that both Mr. and Mrs. He understood the Consent Order Awarding Custody, and signed it freely and voluntarily.	**Regardless of whether Mother believed** the June 4,1999 order was "temporary" (i. *e.*, custody of short duration), **it is clear from the face of the order and the surrounding facts that all of the parties intended for the order to transfer custody**	

Trial Court	Court of Appeals	Supreme Court
	of A.M.H. from the Hes to the Bakers, and it was to remain effective until such time as the Hes sought to file a petition to regain custody.	
126. **The evidence establishes that** both the Hes and the Bakers understood **the June 4, 1999,** Consent Order **Awarding Custody** before they signed **it.**	Based on this testimony, **the trial court concluded that Mother understood the need to file a petition to modify the custody order in the future, and we find nothing in the record to warrant a different conclusion. Accordingly, we find that Mother's argument in this regard is without**	

Trial Court	Court of Appeals	Supreme Court
	merit.	
127. The evidence establishes that Mr. and Mrs. He understood that if the Bakers did not agree to relinquish custody of AMH, the only way for the Hes to regain custody of AMH would be for the Hes to petition a court to regain custody, and the court would then determine whether the Hes would be allowed to regain custody of AMH based on a change in circumstances.	The trial court determined that, based upon the testimony of the witnesses at trial, that Mother was fully advised of the meaning of the June 4,1999 consent order. As previously noted, we find no justification for disturbing this credibility determination on appeal. The record demonstrates that the parties, including Mother, understood this order to transfer temporary custody of A.M.H. from the Hes to the Bakers. Furthermore, the	

Trial Court	Court of Appeals	Supreme Court
	record demonstrates that Mother was informed that she would need to file a petition with the court to regain custody of A.M.H. at a future date. Armed with this knowledge, Mother voluntarily consented to the entry of the order and waived a hearing on the custody issue.	
128. **The evidence establishes that both Mr. and Mrs. He understood, before they signed the June 4, 1999, Consent Order**	**The trial court concluded** that the Hes' attempts to regain custody of A.M.H. during this period were for the sole purpose of avoiding deportation.	

Trial Court	Court of Appeals	Supreme Court
Awarding Custody, that if they filed a subsequent petition to regain custody of AMH, there would be no guarantee or assurance that a court would allow the Hes to regain custody of AMH.		
129. **There is no credible evidence to support the Hes' contention that on June 4,1999, the Hes understood that all the Hes had** to do to regain custody of AMH in the future was to petition a court and custody of AMH would be	**We cannot conclude that the record does not support this conclusion. The trial court determined** that, at the end of the initial three month foster care period, the Hes met with the Bakers and asked them to raise A.M.H. **until she turned eighteen,...**	

Trial Court	Court of Appeals	Supreme Court
returned automatically to the Hes.		
131. ... Sometimes Mr. He would refer to himself, when speaking to AMH, as "Uncle Jack." AMH has always referred to the Hes as "Jack" and "Casey," since AMH was old enough to talk.	**As we set forth heretofore, the record is replete with instances when the Hes expressed concerns about deportation as it relates to custody of their daughter.**	
154. ...[T]he evidence shows that **Mrs. He wanted to retain some parental rights for the sole purpose of avoiding deportation.**	**From the aggregate of the aforementioned facts, it was reasonable for the trial court to infer that the Hes' actions in filing the petitions to regain custody of their daughter**	

Trial Court	Court of Appeals	Supreme Court
	were designed to avoid deportation. On appeal, this Court is not permitted to reject the inferences drawn by the trial court from the circumstantial evidence and substitute our own inferences instead.	
171. By signing the June 4, 1999, Consent Order Awarding Custody, the Hes intended to absolve themselves of all parental obligations to provide support, or any other care for needs of AMH		

Trial Court	Court of Appeals	Supreme Court
during the AMH's minority.		
187. ... **Mrs. Hes'** willful **failure** to **seek reinstatement of visitation** with AMH **demonstrates** that her **goal in filing the Petition to Modify** to regain custody **was for** the **sole purpose of remaining in the United States and avoiding deportation**.		
254. The Court concludes that **the Hes** and the Bakers **knowingly and voluntarily signed the June 4, 1999, Consent**		

Trial Court	Court of Appeals	Supreme Court
Order Awarding Custody in the Juvenile Court of Memphis and Shelby, County, Tennessee.		
257. The Court concludes that Mr. Weaver explained to the Bakers and Mr. He that custody means the actual physical care of the child and includes the right and responsibility to provide for the physical, moral and emotional well-being of the child. The Court concludes that Mr. Weaver explained the legal ramifications involved with modifying a		

Trial Court	Court of Appeals	Supreme Court
temporary custody order, and that there existed a possibility that custody of AMH might not be returned to the Hes. The Court concludes that Mr. He was made fully aware of the legal consequences of agreeing to give the Bakers temporary custody of AMH and the legal requirements of regaining custody later.		
		The evidence establishes that the parents were misled… and uninformed…did not enter into the agreement with

Trial Court	Court of Appeals	Supreme Court
		knowledge...
		...evidence shows... parents... instructed... barring inappropriate conduct... custody would be returned to the parents.
		...evidence overwhelmingly shows... parents'... relinquishment of custody was... to provide health insurance... with... full intent... custody... be returned.
		Therefore, we hold... parents,... did not voluntarily transfer custody... with knowledge

Hypothetical Dialogue Between AMH And Person

Person: AMH, it has been decided that you now must be separated from all of the people you have ever known to be your parents, your grandparents, your sisters and brother, your cousins, your aunts and uncles, your classmates, your Sunday school friends, your teachers and everybody else who has been a part of your life for these past 8 years.

AMH: Where will I be living?

Person: Where ever your new custodians decide for you to live.

AMH: Why?

Person: Because the Tennessee Supreme Court does not think the courts did what they were supposed to do when you were a baby. The Tennessee Supreme Court actually said that the problem was **"the failure of the court system to protect the parent-child relation throughout the proceedings."**

AMH: Is that my fault?

Person: No, you had nothing at all to do with it.

AMH: Does the Tennessee Supreme Court believe this is in my best interest?

Person: Not necessarily. The trial court and the court of appeals decided that it was against your best interest to be taken from the only people you ever have known as your family and placed with your biological progenitors who are strangers to you. The Tennessee Supreme Court did not find fault with what the trial court and court of appeals decided about what is in your best interest. But, the Tennessee Supreme **Court** just **said: "Because ..., it is unnecessary to reach"** an analysis of your best interest.

AMH: What difference does it make to me why the Tennessee Supreme Court refused to consider what is in my best interest?

Person: It makes no difference. The effect on you is the same no matter what reason the Tennessee Supreme Court gave for not considering your best interests.

AMH: What is going to happen to me?

Person: You are going to live with the mother who gave birth to you, your natural father and their two children.

AMH: I don't know those people.

Person: I know you don't, but that doesn't matter.

AMH: What will happen, then?

Person: I don't know.

AMH: Will I ever see the only mother and dad, brother and sisters, cousins, aunts and uncles, grandparents I've ever known or my classmates, teachers and friends again?

Person: Maybe not.

AMH: How will this affect me?

Person: The Tennessee Supreme Court said that you will be substantially harmed by being separated from those you know as your parents, brother and sisters, grandparents, cousins, aunts and uncles. The Tennessee Supreme Court actually said: **"the evidence of substantial harm arises from**

the delay caused by protracted litigation" and that you "**will be harmed from a change in custody because ... [you] lived and bonded with the Bakers ... .**"

AMH: Is it my fault that the litigation was protracted or that I have been living with the Bakers all of the 8 years of my life and am bonded with them?

Person: Of course not.

AMH: Why, then, must I be substantially harmed?

Person: Well, the Tennessee Supreme Court seemed to base your being harmed on public policy that requires it. The Supreme **Court** actually **said**: "**Evidence [that AMH is going to be harmed] cannot ... prevent the parents [biological progenitors who you do not know] from regaining custody [of you]**" because, if you did not get relocated to the progenitors you do not know, this "**would increase the likelihood for delaying cases in order that the child remain in the custody of the non-parent**."

AMH: But, what about me? is that not a high price for me to pay for something I had nothing to do with and that does me no good?

Person: Well, I guess you have to suffer for what the Tennessee Supreme Court would say is other people's good. It's sort of like the soldiers who must be harmed; I guess the theory of the Tennessee Supreme Court is that some children must be harmed to protect unknown biological progenitors of children who you do not know.

AMH: I'm not a soldier, and I could care less about my unknown progenitors or anybody else's progenitors.

Person: I know.

AMH: Is this fair to me?

Person: Probably not; but, I don't know what I can say.

AMH: How much harm is substantial?

Person: It could be a whole lot; it might not be a lot; nobody knows.

AMH: What else?

Person: You will be traumatized. The Tennessee Supreme Court actually said that Juvenile Court should sever your relationship with the only persons you have ever known as mom, dad, brother, sisters, grandparents, aunts, uncles and cousins and relocate you with persons you do not know and do it in a manner that "**minimizes trauma**" to you. So, the Tennessee Supreme Court ruled as it did knowing that its ruling would cause you trauma.

AMH: What's trauma?

Person: I guess it means shock or pain.

AMH: What is "minimize"?

Person: It could be a lot. It could be a little. The Tennessee Supreme Court didn't say and didn't give any indication that it makes any difference.

AMH: What's going to happen to me when I am substantially harmed and traumatized?

Person: I don't know. The Tennessee Supreme Court has required nobody to investigate to see what the answer to that question is.

AMH: Could I be permanently injured for the rest of my life?

Person: I don't know.

AMH: What if it causes me to be an invalid the rest of my life?

Person: The Tennessee Supreme Court, apparently, just expects your biological progenitors to take care of that.

AMH: Can't my mom or dad or grandparents or sisters or brother or aunts and uncles or teachers help me, right now?

Person: No. Only the courts can help you, but they won't appoint a lawyer to help you.

AMH: Do I have any constitutional rights to stop this substantial harm and trauma that the Tennessee Supreme Court has ordered me to suffer?

Person: The Tennessee Supreme Court did not say you did but did not say you did not. The Tennessee Supreme Court acknowledges that the biological progenitors who you do not know have a fundamental constitutional right to have custody of you. The Tennessee Supreme Court actually said **"In addition to the question of whether the evidence supports termination under the statute, the parents of A.M.H. present several constitutional grounds for reversal. Because this case is fully resolved on statutory grounds, we decline to address these issues.** Apparently, the Tennessee Supreme Court determined that what, if any, constitutional rights you have are just not necessary to know because knowing would not make any difference to you.

AMH: Will somebody please help me?

Footnote 4

Examples are *The Due Process Rights of Foster Parents*, 50 Brook. L. Rev. 483 (1982-1983); *Empowering Children: Granting Foster Children The Right To Initiate Parental Rights Termination Proceedings*, 79 Cornell L. Rev. 1200 (1994); Florence Kelly, *On Some Changes In The Legal Status Of The Child Since Blackstone*, Int'l Rev, August 1982, reprinted in The Legal Rights of Children 83, 85 (Robert H. Bremner ed., 1974); Noah Weinstein, Legal Rights of Children 1 (1974); Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. Rev. 637 (1993); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747 (1993); Marcus T. Boccaccini and Eleanor Willemsen, *Contested Adoption and the Liberty Interest of the Child*, 10 St. Thomas L. Rev. 211 (1998); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 Ariz. L. Rev. 753 (1999); Toby Solomon and James B. Boskey, *In Whose Best Interests: Child v. Parent*, 157- DEC N.J. Law. 36, (1993).

Tennessee Supreme Court Decisions
Construing §27-1-113

The Tennessee Supreme Court has upheld the rule every time it has acknowledged its existence. ***Miller v. Kendrict***, 153 Tenn. 546, 285 S.W. 51 (1925) (citing Acts 1925, ch. 100, §12, with headnote reference to Acts 1907, ch. 82); ***State ex rel. Cannon v. Lee***, 124 Tenn. 385, 136 S.W. 997 (1911); ***Shuptrine v. Quinn***, 597 S.W.2d 728, 730 (Tenn.1979); ***City of Columbia v. C.F.W. Construct. Co.***, 557 S.W.2d 734, 740 (Tenn.1977); ***Hackman v. Harris***, 475 S.W.2d 175, 177 (Tenn.1972); ***Ingram v. Carruthers***, 250 S.W.2d 537, 539 (Tenn.1952); ***Nicholson v. Cummings,*** 217 S.W.2d 942, 188 Tenn. 201, 205 (1949) reh. den. Mar. 11, 1949; ***Cooley v. East & West Ins. Co.***, 61 S.W.2d 656, 166 Tenn. 405, 408-09 (1933); ***Kenner v. City National Bank***, 46 S.W.2d 46, 164 Tenn. 119, 124 (1932); ***Smith v. Grizzard***, 259 S.W. 537, 149 Tenn. 207, 210 (1924); ***Freels v. Northrup***, 678 S.W. 2d 55, 57 (Tenn.1984); ***Davis v. Bank of Illinois***, 561 S.W.2d 144, 145 (Tenn. 1978) (over a strong dissent by Chief Justice Henry that the evidence heavily preponderated against the concurrent finding, the Tennessee Supreme Court ruled that, because of the trial court's finding of fact "approved" by the court of appeals stated: "[W]e have no alternative but to affirm the judgment of the trial court as approved by the Court of Appeals."); ***Hamblen County v. Morristown***, 656 S.W. 2d 331, 335 (Tenn.1983); ***Gatlinburg Real Estate***

Co. v. Booth, 651 S.W. 2d 203,205 (Tenn.1983) ("Let there be no mistake, a concurrent finding of fact by the Chancellor and the Court of Appeals is binding on this Court. The Court of Appeals concurred in the Chancellor's finding in the present case that the prospective buyers were able, and so we accepted that finding." order on pet. reh. at 206); ***Broyles v. Ford Life Ins. Co.*** 594 S.W. 2d 691, 692-693 (Tenn.1980); ***Hickory Springs Mfg. Co. v. Evans***, 541 S.W. 2d 97,98 (Tenn.1976), reh. den. Sept. 27, 1976 (at 98: "[t]he Chancellor and the Court of Appeals agreed ... . That concurrent finding ... is conclusive in this Court."); ***Provident Washington Ins. Co. v. Reese***, 373 S.W. 2d 613, 615 (Tenn.1963), reh. den. Jan. 8 1964 ("If there is any evidence ... to support this concurrent finding, it is, of course, binding on the Court. T.C.A. 27-113."); ***Joest v. John A. Denie's Sons Co.***, 126 S.W. 2d 312, 174 Tenn. 410, 416 (Tenn.1939) (at 314-15: "In absence of such contrary finding by the Court of Appeals, the presumption in favor of chancellor's finding continues and a concurrence of the Court of Appeals is implied."); ***Brown v. Timmons***, 110 Tenn. 148, 72 S.W. 958, 959 (1902); ***Conaway v. New York Life Ins. Co.***, 102 S.W.2d 66, 171 Tenn. 290 (1937); ***Fidelity Mut. Life Ins. Co. v. Guess***, 101 S.W.2d 694, 171 Tenn. 205 (1937) ("It is idle to say that there is not in this record substantial evidence to sustain these concurrent findings of the chancellor and of the Court of Appeals, and such findings are under the statute (Code 1932, §10620) binding upon us.")

Tennessee Supreme Court Quotes Re Retrospective Application of New Construction Of Statutes

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§ 234—*Change in construction of statute.*

The overruling of a judicial construction of a statute will not be given retroactive effect. Such a decision will be limited to the effect ordinarily inherent in a legislative change of a statutory rule, that is, merely prospective effect. [fn. 20]

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[Fn. 20] *Taylor v. Ypsilanti*, 105 U.S. 60, 26 L.Ed. 1008; *Douglass v. Pike County*, 101 U.S. 677, 25 L.Ed 968; *Prall v. Burckhartt*, 299 Oll. 19, 132 N.E. 280, 18 A.L.R. 992; *Gentzler v. Smith*, 320 Mich. 394. 31 N.W.2d 668; *Klocke v. Klocke*, 276 Mo. 572, 208 S.W. 825; *Continental Supply Co. v. Abell*, 95 Mont. 148, 24 P.2d 133; Thomas v. State, 76 Ohio St. 341, 81 N.E. 437; *Bagby v. Martin*, 118 Okl. 244, 247 P. 404; *Kenney v. Rhoads*, Wyo. 237, 51 P. 593.

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[at 326] In *Continental Supply Co.v. Abell,* 95 Mont. 148, 24 P.2d 133, 140 (1933), the rule is elaborated on this language:

> The rule that a judicial interpretation of a statute becomes a part of the statute itself, so far as contract and property rights are concerned, and that changes in judicial interpretation should not be given retroactive effect, has received judicial sanction by many court. *Douglas v. Pike County,* 101 U.S. 677, 25, L.Ed. 968; 7 R.C.L. 1010; *Bagby v. Martin.* 118 Okl. 244, 247 P. 404; *Hoven v. McCarthy Bros.,* 163 Minn. 339, 204 N.W. 29; and see 37 Harvard Law Review at p. 424. And it has been held to apply as well to questions of procedure affecting property rights (*Norton v. Crescent City Ice Mfg. Co.* (La.App.) 146 S. 753; *State v. Haid,*

327 Mo. 567. 38 S.W.2d 44; *Kelly v. Rhoads*, 7 Why. 237 51 P. 593, 39 L.R.A. 594, 75 Am.St.Rep. 904), to a criminal case (*State v. Bell*, 136 N.C. 674, 49 S.E. 163), and to a penalty (*People v. Tompkins*, 186 N.Y. 413, 79 N.E. 326, 12 L.R.A.[N.S.] 1081). "A change in judicial view of the law by a subsequent decision could not amount to more than a change in the law by legislation," and, of course, could act prospectively only. *In re Knowles' Estate*, 295 Pa. 571, 145 A. 797, 63 A.L.R. 1086; *Klocke v. Klocke*, 276 Mo. 572, 208 S.W. 825; and see 7 R.C.L. 1010, note 20, and case there cited.

United States Supreme Court Quotations Re Retrospective Application of New Construction of Statutes

Fleming

The [state supreme] Court has power to construe a legislative act, but it has no power by change and construction to date its passage as a law from the time of the later decision. A statute in force when a contract was made cannot be made a subsequent statute through new interpretation by the courts. Any different view would be at variance with the many decisions of this court cited in the [***Tidal Oil Co. v.***] Flanagan 263 U.S. 444, 453 (1924)Case.

Flanagan

In each of them [five prior decisions] the judgment of the state Supreme Court seemed from its opinion merely to be a reversal of a previous construction by it of a statute upon the faith of which the contract had been made. In fact, however, the judgment merely gave effect to an existing subsequent statute impairing the obligation of the contract which was thus a law passed in violation of article 1, section 10.

> Plaintiff in error cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury.

Bouie

The holdings of this Court in ***Bouie*** can best be explained by merely quoting the words of this Court as follows (378 U.S. at 352):

> The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the **claim** is that a **statute precise on its face has been unforeseeably and retroactively expanded by judicial construction**,....
>
> ***
>
> When a statute on its face is narrow and precise, however, it lulls the potential

defendant into a false sense of security, giving him no reason even to suspect that the conduct clearly outside the scope of the statute as written will be **retroactively brought within** it **by** an **act of judicial construction**. If the Fourteenth Amendment is violated, when a person is required 'to speculate as to the meaning of penal statutes'...or to 'guess at (the statute's) (parenthetical in original) meaning and differ as to its application,'..., the **violation is that much greater** when, because the **uncertainty** as to the statute's meaning is itself **not revealed until the Court's decision**, a person is not even afforded and opportunity to engage in such speculation before committing the act in question.

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.

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[at 353]If this view is valid in the case of a judicial construction which adds a

'clarifying loss' to a vague statute, i.e. [Amsterdam, Note, 109 U.Pa.L.Rev. 67, 73-74, n.34]at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where a **construction unexpectedly broadens a statute** which on its face had been definite and precise. Indeed an unforeseeable judicial enlargement of a criminal statute, applied retroactively operates precisely like an ex post facto law, such as Art. I, s 10 of the constitution forbids.

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If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the [at 354] same result by judicial construction. Cf. *Smith v. Cahoon*, 283 U.S. 553, 565,...

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The basic due process concept involved is the same as that which the Court has often applied in holding that an **unforeseeable** and unsupported **state-court** decision on a question of **state procedure** does **not**

constitute an adequate ground to **preclude** this Court's review of a federal question. See, Wright v. Georgia, 373 U.S. 284, 291,...; 357 U.S. 449, 456-458,...; Barr v. City of Colombia, 378 U.S. 146,....The standards of **state decisional consistency** applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether **a state court's construction** of a criminal statute was **so unforeseeable** as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, ' a federal right turns upon the **status** of **state law as of a given moment** in the past- **or** more exactly, the **appearance** to the individual of the status of state law at that moment...(...an original).' (citation omitted). **When a state court overrules a consistent line of procedural decisions with the retroactive effect** of denying a litigant a hearing in a pending case, it thereby deprives him of Due Process of law 'in its primary sense of an opportunity to be heard and to defend (his) (parenthetical and original) substantive right.' Brinkerhoff-

Faris Trust & Sav. Co. v. Hill 281 U.S. 673, 678,...

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Applicable to either situation is this Court's statement in Brinkerhoff-Farris, supra, that '(i)f the result above stated were attained by an exercise of the state's legislative power, the transgression of the Due Process Clause of the Fourteenth Amendment would be obvious,' and 'The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid...(...an original) state statute.' Id, 281 at 679-680,...(emphasis added)

Rogers

Our decision in *Bouie* was rooted firmly in well established notions of *Due Process* (parenthesis in original). ...Its rationale rested on core due process concepts of notice, foreseeability, and, in particular [not exclusively], the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct. (citation omitted)

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Those decisions instead have uniformly viewed *Bouie* as restricted to its traditional Due Process roots. ...[t]he more basic and general principle of fair warning that *Bouie* so clearly articulated.

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[at 460] Petitioner observes that the Due Process and *Ex Post Facto* Clauses safeguard common interests- in particular, the interests in fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive views of laws.

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[at 462] It also adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law.